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### TRANSCRIPT OF RECORD

179

Supreme Court of the United States

OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON; ET AL., APPELLANTS,

28.

THE PULLMAN COMPANY, GUY A. THOMBSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, ET AL.

APPRAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

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#### No. 283

N RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL., APPELLANTS,

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### IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

#### Civil Action Number 38

THE PULLMAN COMPANY, GUY A. THOMPSON, Trustee, The St. Louis, Brownsville and Mexico Railway Company. Debtor; Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor; Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor; Guy A. Thompson, Trustee, San Antonio, Uvalde & Gulf Railroad Company, Debtor; The Texas and Pacific Railway Company, Texas and New Orleans Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Missouri-Kansas-Texas Railroad Company of Texas, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees, The Chicago, Rock Island and Pacific Railway Company, Debtor; Berryman Henwood, Trustee, St. Louis Southwestern Railway Company of Texas, Debtor; St. Louis, San Francisco and Texas Railway Company, The Kansas City Southern Railway Company, Fort Worth and Denver City Railway Company, Plaintiffs.

VS.

THE RAILROAD COMMISSION OF TEXAS, LON A. SMITH, as Chairman and Individually; Ernest O. Thompson and Jerry Sadler, as Railroad Commissioners and Individually; Gerald C. Mann, as Attorney General of Texas and Individually, Defendants

AMENDED COMPLAINT—Filed November 28, 1939

To the Honorable Judges of said Court:

The Pullman Company, a corporation; Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor; Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor; Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western [fol. 3] Railway Company, Debtor; Guy A. Thompson,

Trustee, San Antonio, Uvalde & Gulf Railroad Company, Debtor; The Texas and Pacific Railway Company; Texas and New Orleans Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Gulf, Colorado and Santa Fe Railway Company; Panhandle and Santa Fe Railway Company: Missouri-Kansas-Texas Railroad Company of Texas; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees, The Chicago, Rock Island and Pacific Railway Company, Debtor; Berryman Henwood, Trustee, St. Louis Southwestern Railway Company of Texas, Debtor; St. Louis, San Francisco and Texas Railway Company; The Kansas City Southern Railway Company; and Fort Worth and Denver City Railway Company; as plaintiffs, file this, their Complaint against the Railroad Commission of Texas; and Lon A. Smith, as Chairman, and Ernest O. Thompson and Jerry Sadler in their official capacities as members of the Railroad Commission of Texas; and Gerald C. Mann in his official capacity as Attorney General of the State of Texas; and against each of said named persons individually; and for cause of complaint respectfully aver:

1. The Pullman Company is a private corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and residence in the City of Chicago, Cook County, Illinois; each of the above named railroad and railway companies, except The Texas and Pacific Railway Company, The Chicago, Rock Island and Pacific Railway Company, The Kansas City Southern Railway Company and The Atchison, Topeka and Santa Fe Railway Company, is a corporation duly organized and incorporated under the laws of the State of Texas; The Texas and Pacific Railway Company is a corporation created by the Act of the Congress of the United States approved March 3, 1871, and Acts supplemental thereto approved, respectively, May 2, 1872, March 3, 1873. June 22, 1874, and February 9, 1923, and has its principal [fol. 4] office in the city of Dallas, in Dallas County, Texas: The Kansas City Southern Railway Company is a corporation duly organized and incorporated under the laws of the State of Missouri and has its principal office and residence in the City of Kansas City, in the State of Missouri; and The Atchison, Topeka and Santa Fe Railway Company is a corporation duly organized and incorporated under the laws of the State of Kansas and has its principal

office and residence in the City of Topeka, in the State of Kansas; The Chicago, Rock Island and Pacific Railway Company is a corporation duly organized under the laws of the State of Illinois, having its principal office and residence in the City of Chicago, in Cook County, Illinois. The above named Guy A. Thompson and Berryman Henwood are residents of the City of St. Louis, in the State of Missouri. The above named Frank O. Lowden, James E. Gorman and Joseph B. Fleming are residents of Cook County, in the State of Illinois.

a. Under date of March 31, 1933, Missouri Pacific Railroad Company, a railroad corporation, having its principal operating office at St. Louis, Missouri, filed its petition for reorganization of a railroad under the provisions of the Bankruptcy Act of 1898, as amended, and particularly as amended by the Act of March 3, 1933, in the United States District Court, Eastern Division, Eastern Judicial District of Missouri. On the same date, such petition was approved as properly filed and said Federal Court took jurisdiction, possession, management and control of the rights, properties, franchises and railroad of Missouri Pacific Railroad Company, Debtor.

b. On the same date, International-Great Northern Railroad Company, a railroad corporation, organized and existing under the laws of the State of Texas, filed its petition setting out that the Missouri Pacific Railroad Company owned indirectly through an intervening medium a majority [fol. 5] of the capital stock of the International-Great Northern Railroad Company, Debtor, having power to vote for the election of directors, and that said Missouri Pacific Railroad Company, Debtor, had previously filed its petition for reorganization; and, therefore, the International-Great Northern Railroad Company desired to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of the Missouri Pacific Railroad Company. On the same date, said Federal Court entered its order approving said petition of said International-Great Northern Railroad Company as properly filed, and took jurisdiction, possession, management and control of the franchises, rights, property and railroad of International-Great Northern Railroad Company, Debtor.

- c. Thereafter, on May 2, 1933, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, and San Antonio, Uvalde & Gulf Railroad Company filed in said Federal court a petition setting out that each of said Railway Companies was a railroad corporation, duly organized and existing under the laws of the State of Texas, that said Missouri Pacific Railroad Company, Debtor, owned indirectly through an intervening medium a majority of the capital stock having power to vote for the election of directors; and that each of said corporations desired to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of the Missouri Pacific Railroad Company.
- d. Thereafter, under date of June 22, 1933, the Judge of said Federal Court appointed L. W. Baldwin and Guy A. Thompson as temporary Trustees of all and singular the railroads, lands, properties, estates, rights and franchises of the Missouri-Pacific Railroad Company, International-Great Northern Railroad Company, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, and San Antonio, Uvalde & Gulf Railroad Company; and said Trustees made [fol. 6] the bond required, and became the duly appointed qualified and acting temporary Trustees thereof.
- e. Thereafter, under date of July 25, 1933, the Judge of said Federal Gourt made said appointment permanent. Thereafter, under date of December 26, 1935, said L. W. Baldwin resigned as one of said Trustees, and by order dated December 26, 1935, said Federal Court appointed Guy A. Thompson as sole Trustee with all the rights and liabilities theretofore accorded the joint Trustees; and said order further approved the bond of said Guy A. Thompson, Trustee; therefore, said Guy A. Thompson is now the duly appointed, qualified and acting Trustee, severally, of the lines hereinabove mentioned.
- f. The Texas and Pacific Railway Company and Missouri-Kansas-Texas Railroad Company of Texas have their principal offices, respectively, and reside in the City of Dallas, in Dallas County, Texas; Texas and New Orleans Railroad Company is a resident of, and has its principal office in, the City of Houston, in Harris County, Texas; the Gulf, Colorado and Santa Fe Railway Cempany has its principal

office in the City of Galveston, Galveston County, Texas; the Panhandle and Santa Fe Railway Company has its principal office and residence in the City of Amarillo, in Potter County, Texas; Fort Worth and Denver City Railway Company is a resident of and has its principal office in the City of Fort Worth, Tarrant County, Texas.

g. By an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, dated November 22, 1933, in a cause entitled "In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor," numbered 53200 on the docket of said Court, Frank O. Lowden, James E. Gorman and Joseph B. Fleming were temporarily appointed Trustees of The Chicago, Rock Island and Pacific Railway Company. At the same time they were temporarily appointed Trustees of The Chicago, Rock [fol. 7] Island and Gulf Railway Company. Both appointments were made permanent by an order of the Court in said cause entered on December 28, 1933. On September 1, 1933, acting under authority of the Interstate Commerce Commission as granted by its order of April 3, 1939, under Finance Docket Number 11847, entitled "Chicago, Rock Island & Gulf Railway Company Trustees Lease," a contract of lease was entered into by and between the said Trustees of The Chicago, Rock Island and Pacific Railway Company and the said Trustees of The Chicago, Rock Island and Gulf Railway Company, whereby the possession and operation of the railroad and properties of the latter company were delivered over to the Trustees of The Chicago, Rock Island and Pacific Railway Company. Pursuant to the terms and provisions of said lease contract the said Trustees of The Chicago, Rock Island and Pacific Railway Company on and after September 1, 1939, have operated and are now operating the lines of railroad and properties of the said The Chicago, Rock Island and Gulf Railway Company. The said Frank O. Lowden, James E. Gorman and Joseph B. Fleming are now the duly appointed, qualified and acting Trustees of the said The Chicago, Rock Island and Pacific Railway Company and, as such, under said lease, they are in possession of and are operating the railroads, lands, properties, estates, rights and franchises of the said The Chicago, Rock Island and Gulf Railway Company.

h. The railroad and properties of the St. Louis Southwestern Railway Company of Texas are in possession of and are operated by Berryman Henwood, Trustee, who is the duly acting and qualified Trustee of said properties under and by virtue of an appointment by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, in a case entitled-In the Matter of St. Louis Southwestern Railway Company, Debtor, Number 8497, pending on the docket of said court; said order having [fol. 8] been entered by said court on the 3rd day of January, 1936.

2. Each of the plaintiffs, excepting The Pullman Company, operates trains in or through portions of the State of Texas including Pullman cars furnished by The Pullman Company pursuant to contracts between The Pullman Company and the respective plaintiffs. Such contracts contain provisions that The Pullman Company shall furnish all standard sleeping cars, properly equipped and acceptable to the railroad company, in sufficient number to meet the requirements of travel over the lines of the railroad. Some of the contracts provide that the number of cars so furnished shall be determined by the operating officers of the railroad, and others provide that the number of cars shall be mutually determined by the operating officers of the railroad and The Pullman Company. All of said contracts provide that The Pullman Company shall have the right to collect from the occupants of its cars, for the use of seats. berths and other accommodations therein, such fares as are charged on lines of railroad competing with the lines of the contracting railroad company, where similar accommodations are furnished; and that The Pullman Company shall provide suitable employees for collecting such fares and furnishing the usual sleeping car service to the passengers therein. Each of the contracts provides that such employees' shall, when on duty, be subject to the rules of the railroad company governing its own employees; and also that in order to maintain service acceptable to the railroad company and to the traveling public, The Pullman Company shall furnish agents or inspectors to supervise the sleeping car service, including the conduct of employees, the cleanliness of cars, and such matters. Said contracts set forth generally the obligations and liabilities of the respective parties, and methods of sharing the gress earnings from the sale of seats, berths and other accommodations on the sleeping cars so furnished, certain provisions taking into con[fol. 9] sideration the expenses of operation of The Pullman Company in furnishing the cars and providing the sleeping car service. Under said contracts, the railroad companies do not have the right to direct, nor do such companies assume to direct, The Pullman Company as to what employees or what number or classes of employees shall be assigned to the cars operated over the respective lines of railroad.

- 3. The action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, the due process clause and the equal protection clause; and under the Constitution of the United States, Article I, Sec. 8, the commerce clause; under Article I, Sec. 10, the contract clause; and under the laws of the United States, including the Act of August 27, 1935, c. 774, 49 stat. 911, and amendments thereto and the laws amended thereby; United States Code, Title 11, Sec. 205, et seq.; as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 as to plaintiffs jointly, and as to each plaintiff individually. This is a suit of a civil nature. All defendants reside, officially, in Travis County, Texas; and defendant Lon A. Smith is domiciled in said County.
- 4. Defendants Lon A. Smith, Ernest O. Thompson and Jerry Sadler, purporting to act in their several official capacities as members of the Railroad Commission of Texas, signed, entered and promulgated an order as the order of the Railroad Commission of Texas, dated the 8th day of August, 1939, and effective September 1, 1939, requiring that, after the effective date of said order, "no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or [fol.10] operating the same having the rank and position of Pullman conductor." Said order, in the next succeeding sentence, provides: "The use of the terms 'firm' or 'corporation' as employed in the next preceding paragraph hereinabove is meant to include all companies as defined by Article 6479, Revised Civil Statutes of Texas." A copy of said order is attached to this Complaint and made a part hereof and marked Exhibit "A".

- 5. Said order (Exhibit "A") having been issued by the Commission without notice or hearing, plaintiff The Pullman Company, through its attorneys, promptly applied to the Railroad Commission for a rehearing, for the purpose, as then stated, of showing that the Commission has no authority to issue such an order; and said plaintiff requested that, pending further action by the Commission, said order be suspended. Pursuant to said request the Commission issued an order, dated August 19, 1939, postponing the effective date of the aforesaid Passenger Circular No. 164 to September 15, 1939, and notifying the interested parties of a hearing to be held on August 31, 1939, wherein the Commission proposed to "take up and consider the matter of operating sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." A copy of said order of August 19, 1939. is hereto attached, marked Exhibit "B".
- 6. Pursuant to the aforesaid notice (Exhibit "B") the plaintiffs, through counsel, appeared at said hearing on August 31, 1939, and stated at the beginning of the hearing that they objected to any such order on the ground that the same is beyond any authority heretofore granted to the Commission by the Legislature. All evidence offered in [fol. 11] behalf of plaintiffs at said hearing was presented subject to said objection.
- 7. Pursuant to the Commission's direction the hearing was conducted by an examiner, and the record of the hearing was subsequently transcribed. No final action was taken by the Commission until on November 4, 1939. Meanwhile, the Commission, of its own motion, by orders issued, respectively, on September 6, 1939, October 3, 1939 (erroneously dated September 3, 1939), and October 27, 1939, postponed the effective date of said Passenger Circular 164, successively, to October 5, 1939, to November 1, 1939, and to November 15, 1939, respectively. Copies of said orders are hereto attached, marked Exhibits "C," "D," and "E," respectively.

8. Thereafter, on or about the 4th day of November, 1939, the Railroad Commission of Texas issued its order whereby, among other things, (as was done in Passenger Circular No. 164) it is "ordered, adjudged and decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

The order of November 4, 1939, is more extensive than the original order (Exhibit "A"), all of which is more fully made to appear by the said order of November 4, 1939, a copy of which is hereto attached, marked Exhibit "F", and hereby made a part of this Complaint with the same effect as if textually incorporated herein at this place. The latter order contains many erroneous findings that are contrary to the facts, the detailed denial of which would unduly extend this Complaint and unnecessarily encumber the

record.

9. Said order of November 4, 1939 (for brevity hereinafter referred to as the challenged order) is predicated [fol. 12] upon findings made by the Commission to the effect that the operation of said Pullman cars without a Pullman conductor in charge constitutes an abuse and discrimination in the matter of fares, charges, compensation and rates, and that such operation is violative of Articles 4005, 4013 and 6474, Revised Statutes, 1925; and that the charges made by the railroads and The Pullman Company for transportation in such cars and for the privilege of riding therein are unjust and unreasonable. As further appears from said order, the action taken by the Commission is predicated upon a purported consideration of not only the "safety, care, convenience, proper accommodation and transportation of passengers on Pullman cars," but of the "charges, fares and transportation of passengers on sleeping cars and Pullman cars within the State of Texas, and to prevent abuses, unjust discrimination and extortion in rates."

10. No notice was issued by the Commission that at the hearing on the 31st day of August, 1939, the Commission would consider the matter of the proper "charges and fares

of passengers on sleeping cars and Pullman cars" or that the Commission would consider the matter of preventing "unjust discrimination and extortion in rates." Thus, while the challenged order is expressly predicated upon the authority assumed by the Commission to define and prohibit abuses and to define and correct "unjust discrimination and extortion in rates," no notice was issued by the Commission that the matter of defining or correcting "unjust discrimination and extortion in rates" would be involved in said hearing, and no appearance was entered at said hearing for any such purpose.

- 11. No hearing has been called or held by the Commission for the purpose of determining whether a differential in the rate should be recognized, or whether different rates should be adopted for the transportation services that in the challenged order are declared to be different in quality. [fol. 13] The Commission has not called or conducted a hearing for the purpose of determining, and has not determined, what would be a reasonable rate of railroad fare for passengers accommodated in a Pullman car not in charge of a Pullman conductor, as distinguished from the rate applicable to passengers accommodated in a Pullman car that is attended by a Pullman conductor. And the Commission under existing conditions is powerless to issue or enforce a tariff allowing such differential since, as elsewhere shown herein, such tariff would be in conflict with interstate tariffs approved by the Interstate Commerce Commission.
- 12. While the challenged order professes to have been issued for the purpose of preventing and correcting "unjust discrimination and extortion in rates," the order is an effort to compel the plaintiffs to render a certain service in a particular way. It does not prescribe different rates for services found to be different, but, instead, attempts to require the railroad companies and The Pullman Company to abolish the differences in services being rendered. In this connection plaintiffs show that the Railroad Commission has no authority to require that the services rendered by the railroad companies and The Pullman Company shall be equal or identical in character or value to the passengers. Its power, if any, to prescribe different rates for services that are actually different in value to the pas-

sengers does not involve the power to require that only equal or identical services be rendered. The order does not in fact correct or prevent any "unjust discrimination and extortion in rates." The challenged order is predicated upon the assumption, contrary to fact, that the service furnished by the railroad company to passengers in a Pullman car not in charge of a Pullman conductor is substantially inferior to that furnished to passengers on another train in a Pullman car attended by a Pullman conductor. This constitutes no valid ground for the issuance or enforcement of an order by the Railroad Commission prohibit-[fol. 14] ing the operation of trains carrying a Pullman car not in charge of a Pullman conductor. On the pretended ground that the order is designed to prevent "unjust discrimination and extortion in rates," the Commission has issued the challenged order in the guise of a rate order. Furthermore, the operation of the trains carrying a Pullman car not in charge of a Pullman conductor does not work an unjust discrimination or extortion in rates as between passengers, nor does it result in an undue or an unreasonable preference or advantage as to passengers, either in rates or in service. And such operation does not discriminate against passengers in the Pullman cars as distinguished from passengers in the chair cars.

13. The challenged order is in substance an order attempting to define and prohibit acts deemed by the Commission to constitute an abuse. No power or authority has been conferred upon the Railroad Commission or the members thereof to promulgate the challenged order. power to make and enforce regulations governing railroads and common carriers is limited to the powers expressly defined in Articles 6445 and 6448, Revised Civil Statutes of Texas of 1925. By no statute has the Commission been empowered to determine how many or what employees shall attend a sleeping care or that sleeping cars or Pullman cars shall be in charge of a Pullman conductor or a person having the rank and position of Pullman conductor. "abuses," the correction of which is entrusted to the Commission by said statutes, are limited to such acts as have been defined as abuses by valid statutes enacted by the Legislature. The Railroad Commission has not been given power by any statute to define abuses, to enact a law or to issue and enforce an order or decree denouncing as abuses

such acts as may be deemed by the Commission to be abuses. No statute has defined as an abuse the operation of a train carrying a sleeping car or cars occupied by passengers holding the proper transportation for such accommodations [fol. 15] "unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning and operating the same having the rank and position of Pullman conductor"; nor is such operation an abuse in fact.

14. If the sleeping cars forming a part of the trains described in Exhibit "G" were owned and supplied by the railroads instead of by The Pullman Company, there would be no reason for requiring, and the Railroad Commission would have no authority to require, that the railroads operating such trains should have two conductors instead of one conductor on the trains. The duty of the operating railroad company to the passengers on the sleeping cars in such trains is not different from what it would be if such cars were owned and supplied by the railroad company instead of being owned and supplied by The Pullman Company under contract between The Pullman Company and the railroad company. In each instance the train is operated by the railroad company, and each and all of the cars making up the train are in charge of the train conductor. If, in performing the service to which the passengers are entitled, additional employees were needed to assist the train conductor in operating the train, the Railroad Commission would have no authority to require that such assistance be furnished by The Pullman Company instead of by the railroad company, or to require that the requisite service be performed by an employee having the rank and title of Pullman conductor. Under no circumstances has the Commission the power to compel the railroad companies to have a given service or services performed by an employee of The Pullman Company or by such an employee having the rank and title of Pullman conductor.

15. The contracts between The Pullman Company and the railroads referred to in the challenged order were not made for the benefit of strangers to the contracts in the sense that persons other than the parties to the contracts [fol. 16] have any beneficial interests in them or rights thereunder. And the Railroad Commission has no jurisdiction over such contracts and no duties to perform in

respect of said contracts. The contracts have not been breached and are not being breached in respect of the matters referred to in the challenged order but are being fully performed to the entire satisfaction of the parties thereto. The rights of passengers on the railroad trains are not dependent upon the making of such contracts; the absence of such contracts would not diminish the rights of passengers on the railroad trains, and the existence of the contracts adds nothing to such rights. It is of no consequence to the passengers whether the railroads supply the sleeping car accommodations or whether by means of contracts they cause such accommodations to be furnished by The Pullman Company.

16. It is not true that The Pullman Company is dependent upon the Pullman conductor to supervise the conduct of employees and the cleanliness of cars, etc., while en route. Nor is it true that The Pullman Company has not furnished any other agent to supervise such conduct of employees and cleanliness of the cars except Pullman conductors. On the contrary, The Pullman Company furnishes traveling inspectors, district representatives and operating agents who are constantly engaged in the supervision of Pullman employees and service. In the matter of preserving order and protecting the passengers from annoyance, the train conductor has charge of the entire train. obligation of the railroad company to the passengers in this respect is not different on the trains mentioned in Exhibit "G" from what it is on the heavier trains carrying a Pullman conductor. On the lighter trains such as described in Exhibit "G" carrying, as a rule, only one Pullman car, the conductor has a better opportunity to give his personal attention to all passengers on the train. The brakeman or flagman on all such trains is required to ride in the Pullman [fol. 17] car, the rear of the train, while the train is in Passenger traffic on such trains is not heavy enough to require the services of additional employees.

17. The fact, if it be a fact, that on one occasion or more than one occasion a Pullman porter has become intoxicated while on duty constitutes no ground for the issuance of the challenged order. Such rare occurrences are not confined to Pullman porters. They are not confined to the negro race. It is not a fact, and the Commission has not found, that the service rendered either by the railroad companies

or by The Pullman Company on the lines described in Exhibit "G" has been unsatisfactory to the passengers on account of drunkenness of the Pullman porters. The Commission has not found, and it is not a fact, that the Pullman porters on such runs are incompetent or that Pullman porters on such runs are inherently or as a class offensive, untrustworthy or unsatisfactory.

18. The Railroad Commission in issuing the challenged order has discriminated against certain employees of The Pullman Company because they belong to the negro race. The effect of the order is to prohibit and prevent the performance of certain services by employees of the negro race, and to prohibit and prevent the earning by such employees of the additional compensation now earned by them for the performance of such services; and to require thesuch services be performed by Pullman employees who are members of the white race. In this connection the plaintiffs show that the fact that the Pullman car and the furnishings and property of The Pullman Company in the car are placed in the custody of the porter in the lines described in Exhibit "G" does not mean that the Pullman porter is placed in charge of or undertakes to control or manage the passengers accommodated in the Pullman car. railroad conductor is at all times in charge of every car in the train.

[fol. 18] 19. On all the lines described in Exhibit "G" interstate passengers are transported in the Pullman cars. On some of them, notably those described as Pullman Line No. 3175, operating between Shreveport, Louisiana, and Kansas City, Missouri, the only passengers transported in the Pullman cars in the State of Texas are interstate passengers. The challenged order recites that "it is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce." The order, however, does apply to interstate commerce and not only constitutes a burden on interstate commerce, but in its application to interstate transportation it is in conflict with applicable passenger

tariffs in force with the approval of the Interstate Commerce Commission. Under and pursuant to such interstate tariffs, the plaintiff railroad companies are entitled to transport passengers in the Pullman cars without being required to conform to the burdens of the challenged order. And The Pullman Company is likewise entitled, pursuant to published sleeping car tariffs approved by the Interstate Commerce Commission, to accommodate such passengers on the lines described in Exhibit "G", without being required to conform to the challenged order. The effect of the order if enforced, is to deny to the plaintiff railroad companies the right to transport, and to deny to The Pullman Company the right to accommodate, the interstate passengers on said lines pursuant to the interstate tariffs approved by the Interstate Commerce Commission. intrastate transportation and interstate transportation of passengers on such lines are so related that the govern-[fol. 19] ment of the one involves the control of the other. Consequently, the final and dominant rule is that prescribed by the Interstate Commerce Commission pursuant to Acts of Congress. Hence, the challenged order, being in conflict with the superior regulations promulgated by the Interstate Commerce Commission, is void.

- 20. The passengers accommodated in the Pullman cars on the lines described in Exhibit "G" receive from the railroad employees, including the conductor and the brakeman or flagman, service and attention that such employees cannot ordinarily render on the beavier trains. quently, a portion of the service rendered to passengers on the heavier trains is rendered by a Pullman conductor. Traffic conditions being different, the railroad companies and The Pullman Company have the right, in the management of their properties, to adjust the duties of employment between the several employees in a way that is appropriate to the varying traffic conditions. The challenged order, unless enjoined, will operate as an arbitrary and unreasonable interference with such right and wiff require the employment of additional Pullman employees, whose employment is not warranted by the transportation demands.
- 21. As defendants construe and will attempt to apply the challenged order, it purports to prohibit the operation in the State of Texas of a Pullman or sleeping car or cars

as a part of a railroad passenger train unless such cars while occupied by passengers are continuously in charge of a Pullman conductor, notwithstanding the fact that all Pullman cars, as an integral part of the train, are at all times in charge of the train conductor, who is the ranking officer on the train; and the railroad passengers in the Pullman car are entitled to the same services on the part of the train conductor that are performed in respect of other passengers on the train, and in addition the extra or special services rendered to passengers by The Pullman Company in the Pullman car At the present time a num-[fol. 20] ber of the regularly scheduled railroad passenger trains in the State of Texas on which Pullman sleeping cars are operated have no Pullman conductor on board during all or a portion of the route. Such method of operation is not of recent origin in the State of Texas or in the other States of the United States. On the contrary, it has obtained under appropriate conditions in various portions of the country since the beginning of Pullman car operations, and has been generally followed throughout the company's history of approximatel, 72 years. And, as is hereinafter more particularly shown, such method of operating trains has obtained on some of the lines now in operation in the State of Texas for a period of approximately 14 years, and on other lines previously in operation in Texas for periods prior thereto. Attached hereto and marked Exhibit "G", and hereby made a part of this Complaint, is a statement listing and describing the Pullman car operations on passenger trains now regularly operated in the State of Texas, and in effect on August 8, 1939, the date of the Commission's order, each train with a Pullman car that between designated points is not in charge of a Pullman conductor. Said Exhibit "G" shows as to each such operation: in column 1, the number by which The Pullman Company designates the line; in column 2, the terminals, that is to say, the points between which Pullman cars are operated as part of the train on the designated railroad or railroads; and in the 3rd, 4th, 5th, 6th and 7th columns the points in the State of Texas between which Pullman cars are operated without a Pullman conductor, the time of departure from, and time of arrival at, and distance in miles between such Texas points. The time schedules shown in Exhibit "G," subject to change by the railroad company, are the schedules presently in

effect, and are fairly typical of the schedules that have been in effect on such railroads during the existence of such operations.

[fol. 21] 22. As shown by Exhibit "G" of this Complaint, among the trains that would be affected by the challenged order of the Commission are:

Pullman Line 3723—St. Louis-Brownsville. Trains Nos. 15 and 16 of The St. Louis, Brownsville and Mexico Railway Company (presently operated by Guy A. Thompson. Trustee) operate between Houston, Texas, and Brownsville, This operation has two Pullman cars with a Pullman conductor between Houston and Harlingen, situated about 25 miles from Brownsville. At Harlingen one of the Pullman cars, with the Pullman conductor, on the southbound train is transferred to a branch line and goes to Mission, a distance of about 40 miles from Harlingen. The other Pullman car continues from Harlingen to Brownsville, without the conductor, a distance of 25 miles. According to the present schedule the southbound train arrives at Harlingen at 7 a. m., leaving shortly thereafter, and arriving at Brownsville at 7:55 a.m. The northbound train, originating at Brownsville, according to the present schedule, carries one Pullman car from Brownsville to Harlingen, leaving Brownsville at 9 p. m. and arriving at Harlingen at 10 p. m., at which point the train picks up the Pullman car originating at Mission with the Pullman conductor, and the train from Harlingen to Houston carries a Pullman conductor. Compliance with the challenged order would require either two Pullman conductors on the train at the same time north of Harlingen or would require the stationing of a Pullman conductor at either Browns ville or Harlingen for the purpose of traveling on the trains between those points, a total distance of 50 miles per day, covering a period of approximately two hours per day.

Pullman Line 3128—Fort Worth-Houston. The Texas and New Orleans Railroad Company operates a train between Houston, the southern terminal, and Dallas and Fort Worth, the two northern terminals. The northbound train [fol. 22] originating at Houston carries a Pullman car destined to Dallas and a Pullman car destined to Fort

Worth. At Ennis the northbound train divides, one portion of the train carrying one Pullman car going to Fort Worth and the other portion going to Dallas. The Pullman conductor accompanies the Dallas train between Ennis and Dallas, and between Ennis and Fort Worth the train does not carry a Pullman conductor. This operation has been in effect continuously since 1925. Compliance with the challenged order would require the unnecessary employment of an additional Pullman conductor to accompany the train between Fort Worth and Ennis, a distance of 56 miles.

Pullman Line 3258—Houston-Wichita Falls. The Missouri-Kansas-Texas Railway Company of Texas operates a daily train on which a Pullman car is operated in each direction between Houston and Wichita Falls, Texas, carrying a Pullman conductor between Houston and Fort Worth; and operating one Pullman car between Fort Worth and Wichita Falls without a Pullman conductor. The present schedule between Fort Worth and Wichita Falls is from 8:30 a. m. to 1:30 p. m.; and from Wichita Falls to Fort Worth from 4:40 p. m. to 10 p. m. On the Pullman car between Fort Worth and Wichita Falls the line averages 2.3 passengers northbound and 3.4 passengers southbound daily.

Pullman Line 3309—Galveston-St. Louis. The International-Great Northern Railroad Company, in connection with other railroads, operates a train daily in each direction between Galveston, Texas, and St. Louis, Missouri. Between Houston and St. Louis the train carries more than one Pullman car and is accompanied by a Pullman conductor. Since March 15, 1925, the train has carried one Pullman car between Galveston and Houston, a distance of 50 miles, without a Pullman conductor. The present north-bound schedule from Galveston to Houston is 10:30 a. m. to noon, and the southbound schedule, Houston to Galveston.

is 1:10 p. m. to 2:40 p. m.

[fol. 23] Pullman Line 3748—Dallas-Corpus Christi. The San Antonio, Uvalde and Gulf Railroad Company operates a daily train in each direction between San Antonio and Corpus Christi, Texas. The operation involved carries Pullman cars between Dallas and San Antonio with a Pullman conductor; and a single Pullman car between San Antonio and Corpus Christi with no Pullman conductor. According to the present schedule the train leaves San Antonio at 8 30 a. m., arriving at Corpus Christi at 12:45

p. m.; and returning leaves Corpus Christi at 5:30 p. m. and arriving at San Antonio at 9:45 p. m., a distance of 150 miles. In the Pullman car between those points the train averages daily 3 passengers northbound and 4 passengers southbound.

Pullman Line 3501—St. Louis-El Paso. On the train operated by the Texas and Pacific Railway Company in conjunction with the Missouri Pacific Railway Company between St. Louis and El Paso the operation is without a Pullman conductor from Texarkana to Marshall, a distance of 67 miles, covering a period of time of approximately one hour and thirty minutes. This method of operation has been in effect for more than twelve years.

On Pullman Line 3424 on the train operated by the St. Louis, San Francisco and Texas Railway Company in conjunction with the St. Louis, San Francisco Railway Company, between Galveston and Tulsa, the train is without a Pullman conductor between Denison and Tulsa, in each direction; which means that such operation within the State of Texas is between Denison and Platter, a distance

of only 11 miles.

Pullman Line 3273 on the train operated by the Missouri-Kansas-Texas Railway Company of Texas in conjunction with the Missouri-Kansas-Texas Railway Company, between San Antonio, Texas, and Kansas City, Missouri, carries a Pullman car without a Pullman conductor between Denison and Kansas City, both directions. The operation in the State of Texas without a Pullman confol. 24 ductor is between Denison and Colbert, a distance of only 7 miles, a daylight operation in both directions, covering a period of less than 30 minutes.

Pullman Line 3175 on a train of the Kansas City Southern Railway Company operates between Shreveport, Louisiana, and Kansas City, Missouri, without a Pullman conductor, and has so operated for a period of approximately 7 years. The train traverses a corner of the State of Texas between Bloomburg and Texarkana, a distance of only 21 miles, in approximately 30 minutes.

Pullman Line 3015. The Atchison, Topeka and Santa Fe Railway Company operates an interstate train between El Paso, Texas, and Albuquerque, New Mexico, including a Pullman car with no Pullman conductor. The operation in the State of Texas is between El Paso and La Tuna, a distance of only 18 miles, requiring approximately 30 minutes.

Pullman Line 3531—Marshall-Little Rock. The Texas and Pacific Railway Company operates in Texas an interstate train which runs from Fort Worth to Memphis, carrying a Pullman car without a conductor from Marshall, Texas, to Little Rock, Arkansas. The car is so operated in Texas from Marshall to Texarkana, a distance of 67 miles.

23. As examples of type of trains described in Exhibit "G": The St. Louis, Brownsville and Mexico Railway Company, Trains 15 and 16 (Pullman Line 3723 as described in Exhibit "G"), each consists of 3 passenger cars, including the Pullman car. International-Great Northern Railroad Company, Trains 21 and 22 (Pullman Line 3309). carrying a Pullman car without a conductor between Galveston and Houston, each consists of two passenger cars, including the Pullman. Trains known as Beaumont, Sour Lake & Western Railway, Trains 3 and 4 (Pullman Line 3010), each consists of 4 passenger cars, including the Pull-Trains 205 and 206 of the San Antonio, Uvalde & [fol. 25] Gulf Railroad (Pullman Line 3748), each consists of 3 passenger cars, including the Pullman. In each of the trains mentioned, there is in addition to the passenger cars, either a baggage car or a combination baggage, express and mail car. All of the other trains described in Exhibit "G" are what is known as light passenger traffic trains on that part of the route where, as shown, the Pullman car is without a Pullman conductor. During such operation none of said trains carries more than 3 passenger cars, including a Pullman car. Each of the trains described in Exhibit "G" is at all times in charge of the train conductor, assisted by a flagman or brakeman and usually by a train porter.

24. In addition to the regularly scheduled Pullman operations described in Exhibit "G", the plaintiff railroad companies at irregular intervals carry as a part of their trains, as demand for such service arises, what are known as chartered sleeping cars, and on other occasions what are known as private cars. Such cars are owned, and with their necessary attendants are supplied, by The Pullman Company. Chartered cars are as rule similar in their appointments to the standard Pullman cars operated on regularly scheduled runs. The private cars, of which The Pullman Company owns a number, are available for charter by individuals, or groups at scheduled tariff rates which are on file with the Interstate Commerce Commission. Sleeping cars are also

available for charter by individuals or groups. Persons using such private cars as well as the chartered sleeping cars are passengers who hold railroad transportation and are entitled to accommodations therein. Under published tariffs, eighteen railroad fares are required to cover the transportation of these cars, which revenue accrues entirely to the railroads over which the cars are operated. Collection of the Pullman tariff rate covering the use of these cars, the amount being dependent upon the period the cars are to be used, is made in advance by the representative of [fol. 26] the The Pullman Company arranging the movement. It has been the practice of The Pullman Company to provide conductors for private cars, since there are no duties for a conductor to perform and there has been no demand for a Pullman conductor in operations of that kind. The regular crew of a private Pullman car consists of a cook and two attendants, but frequently at the request of the person or persons engaging the car only a cook and one attendant are furnished. Private cars are usually placed at or near the head end of the train to insure privacy to the occupants of such cars. Thus, while cars of this type may be handled in a train on which a Pullman conductor is operated. he has no jurisdiction over them. Such cars are operated in accordance with itineraries provided in advance by the parties engaging them. Frequently itineraries provide for layovers for extended periods. Persons engaging such cars would object to the presence of a conductor since he would not only be in the way, but would have to be provided with accommodations and with meals at the expense of the persons engaging such cars.

25. The need for a Pullman conductor on a given train is determined by operating conditions affecting that train, including the volume of traffic, the length of the train, with the consequent demands upon the time and services of the railroad and Pullman employes. In determining whether a given train shall be attended by a Pullman conductor, The Pullman Company necessarily relies upon its knowledge gained from long experience and study of operating conditions. In general, the operation of Pullman cars without Pullman conductors applies to comparatively short distances, frequently to only a small portion of the entire length of the run of the car. The nature of the duties of the porter is such that his services are necessary on the car.

The operations on which Pullman conductors are not now being used in Texas embrace runs of the kind above described and those in which traffic is light and where the [fol. 27] revenue and other factors do not warrant the additional expense that would be incurred in providing Pullman conductors. The earnings per Pullman car on many of such lines is substantially below the expense point. If The Pullman Company is required to provide a Pullman conductor for such train that carries a Pullman car, the operating expense will be increased thereby to such an extent that the company will be compelled to arrange for the discontinuance of Pullman car service on such trains, as mentioned in paragraph 33 hereof, or else operate said cars at an additional substantial loss, in that the expense of operating such cars will greatly exceed the revenues derived therefrom. The Pullman Company and the plaintiff railroad companies are interested in maintaining sleeping car service on as many trains as possible for the accommodation of the traveling public. Further, the discontinuance of Pullman service unavoidably throws out of employment conductors, porters, mechanics, electricians, cleaners, and others.

26. The principal duties of a Pullman conductor are to collect Pullman fares, assign accommodations to passengers, make up diagrams, and give supervision of service on the cars. On a train carrying soveral Pullman cars, the services of a conductor are deemed necessary, but in operations where the volume of traffic is light, one Pullman employee on the car is able to do all that is required to maintain the The furnishing of Pullman service to railroad passengers in Pullman sleeping cars embraces the greater comfort and convenience of the special facilities of the sleeping car as distinguished from a railroad day coach. It embraces reserved and specially assigned accommodations, including the berth or room at night, comfortable seats and ample space in the daytime, clean and comfortable dressing rooms and toilet facilities, plenty of clean linen, having the berths prepared for occupancy at the beginning of the night and put away in the morning. Persons occupying accommodations in Pullman cars are rail-Ifol. 28] road passengers and are entitled to the same attention from the train conductor as are coach passengers. The train conductor is the ranking authority on the train, and

in respect of the operation of the train, and the supervision, care and safety of all passengers, he is in charge of the entire train, including the Pullman cars; and all railroad and Pullman employees are subject to his orders. The rules governing the duties of Pullman employees require them to refer many matters of operation to the authority and discretion of the train conductor.

27. The Pullman Company exercises great care in the employment of its porters, in supervising their work, in maintaining, and in requiring from them, a high standard of service. They are selected for their intelligence, dependability and good character, and are required to render efficient and courteous service to passengers. pany through its superintendents, district superintendents, agents, inspectors and other supervisors, constantly supervises the work of porters. Such representatives frequently travel in the cars for the purpose of supervising the service enroute, and a record is carefully kept of the quality of service of all employees. The successful operation of The Pullman Company's business necessarily depends upon the company's maintaining a high quality of service to passengers. This quality of service is not diminished when Pullman conductor operation is not provided on cars where traffic conditions do not warrant or justify the operation of Pullman conductors. On trains where there is no Pullman conductor operation, the service rendered to passengers by The Pullman Company and by the railroad company is of the same character and quality as that accorded where Pullman conductors are operated. When a Pullman passenger boards the train and surrenders his Pullman ticket or pays his fare and is assigned his Pullman car accommodations, identically the same service is rendered, irrespective of whether The Pullman Company is represented by a Pullman conductor or by a Pullman porter. The Company assigns, and has made a practice of assign-[fol. 29] ing, to runs where Pullman conductor operation is unnecessary, experienced porters having records of many years of efficient and faithful service, and fully qualified to perform all of the duties assigned to them, including the duties that would be performed by a Pullman conductor if present. The average period of service with The Pullman Company of the porters assigned to the runs in Texas. described in Exhibit "G" is 19 years. Some of them have

been in the service of the company for a period of 33 years, and none of them has been in the service for less than 12 years. No complaint has been made for discourtesy to passengers or for failure of duty on the part of said porters on said runs during the time such method of operation has been in effect in the State of Texas.

- 28. The Pullman Company's method of conducting its operations and of serving its patrons in the state of Texas is similar to that employed generally by the company under similar conditions in other parts of the United States, and the facts do not warrant the conclusion that the quality of service rendered to its traveling patrons on the lines in Texas described in Exhibit "G," is inferior to that rendered on the lines that are accompanied by Pullman conductors.
- 29. While the Pullman porter attending a Pullman car without a Pullman conductor receives extra compensation. the additional amount is only a small portion of the conductor's salary that would be imposed upon the company as an additional expense by the challenged order. The average annual salary of a Pullman conductor is appl ximately \$2400.00. Compliance with the Railroad Commission's order would require the employment of 19 Pullman conductors at an annual expense to The Pullman Company of approximately \$45,000.00. This would be offset in part by elimination of the higher rate allowed the porters on the lines described in Exhibit "G." The net amount of added expense after allowing such offset item would be approximately \$33,000.00 per annum. Plaintiff railroad [fol. 30] companies are interested with The Pullman Company in maintaining the service as it is now maintained and in saving unnecessary expense. If the service provided by The Pullman Gompany in the lines described in Exhibit "G" is withdrawn, such withdrawal will substantially diminish the railroad passenger traffic and revenues on each of said lines.
- 30. The injury that would be suffered by the plaintiffs by having to conform with the requirements of an order like that contained in Exhibit "F" is not fully measured by the direct effect of the order on the Texas operations described in Exhibit "G." Passenger traffic conditions are constantly changing, and the necessity for changing schedules and for establishing or withdrawing trains arises from

time to time in consequence of changed conditions. Plaintiff railroads have in the past operated trains, in addition to those described in Exhibit "G," carrying Pullman cars without Pullman conductors, and if and when traffic conditions so require or make it desirable in the future they will, unless prevented by the commission's order, do so again. The right to institute and maintain such service and to call on The Pullman Company for its cooperation in that respect, and the right of The Pullman Company to respond, are valuable rights of which plaintiffs will be unconstitutionally deprived by the enforcement of said order. The property rights that will be destroyed by the enforcement of said order are of the value to each of the plaintiffs of a sum exceeding \$3000, and of said value to plaintiffs jointly.

- 31. The Pullman Company's operations are national in scope, and there are no conditions peculiar to the State of Texas that would make it necessary or proper to conform to such a policy in the State of Texas and not in other States .. The company exercises the same high degree of care in selecting Pullman porters operating in the State of Texas that is used in selecting porters operating elsewhere. The standards for service in the State of Texas are equal to those [fol. 31] applied in other sections of the country. The Pullman porters in Texas and throughout the south are equal in qualifications to the Pullman porters operating in other portions of the country. No complaints have arisen in Texas from the operation of cars without Pullman conductors or from the conduct or services of Pullman porters on duty in such circumstances. The Pullman Company's experience shows that the services rendered to the public by the porters that have been selected for such operations in the State of Texas will compare favorably with the service maintained by the company in other sections of the country.
- 32. The operation of Pullman cars as integral parts of railroad trains is necessary to the conduct of the business of railroad passenger transportation. The railroads require sleeping car and other Pullman car accommodations for their passengers in order to meet the demands of the traveling public. The railroad companies do not own such equipment and for many years have contracted with The Pullman Company to supply such cars when needed by the

railroads to meet the requirements of travel over their respective lines. The Pullman Company to meet such demand has invested many millions of dollars in such equipment, and it cannot profitably make use of such investment except by furnishing the cars to the railroads for such operation in the way in which transportation has been conducted, in cooperation between the railroads and The Pullman Com-Thus the railroads are dependent pany, for many years. upon The Pullman Company for the furnishing of the service that is now supplied by The Pullman Company; and The Pullman Company is dependent upon the railroads for the transportation service supplied by the railroads. The railroad companies are injuriously affected by any such order as Exhibit "F," affecting injuriously The Pullman Company and interfering with its operations; and The Pullman Company is injured by any such order whether directed and enforced against the railroads or directed in terms against the railroads and The Pullman Company.

33. The Pullman Company is not a common carrier and is not engaged in business in the State of Texas as a common carrier. The Railroad Commission of Texas has no jurisdiction over and no duties to perform in respect of The Pullman Company, and prior to the issuance of its said order of August 8, 1939, has not attempted to regulate said company in the conduct of its business, and has not. asserted jurisdiction or authority over The Pullman Company or the conduct of its business in any matter whatsoever except on one occasion, in about 1907, and such attempt was enjoined by a court decree. Whether the defendants undertake to enforce the challenged order by threatening to 9 prosecute penalty suits against the railroad companies or whether such action be taken also against The Pullman Company, The Pullman Company will at all events suffer irreparable injury since, in the absence of an injunction, the railroad companies will not haul the Pullman cars in their trains in violation of said order, and, in consequence, The Pullman Company will be compelled either to comply with the order or to curtail its service by withdrawing and discontinuing Pullman cars on those trains that do not carry Pullman conductors; and such curtailment would be dependent upon arrangements therefor between The Pullman Company and the railroads to whom Pullman cars, and employees for the provision of sleeping car service therein, are

furnished under contracts between said companies, plaintiffs herein.

- 34. Notwithstanding the want of power and authority to promulgate or to enforce the order here complained of, the Railroad Commission and its members, or a majority of them, and the Attorney General at their instance, will endeavor to enforce the same against the plaintiffs. If the plaintiffs fail, refuse or neglect to comply with said order, said defendants, unless enjoined by court decree, will endeavor to subject said plaintiffs to the penalties prescribed by Articles 6476 and 6477 of said Revised Statutes, author—[fol. 33] izing the collection of a penalty of not more than \$5,000.00 for failing, neglecting or refusing to obey any lawful requirement, order, judgment or decree made by the Railroad Commission. For relief against being subjected to such suits and excessive penalties plaintiffs have no adequate remedy at law.
- 35. As the basis for said order the Railroad Commission has assumed the right and power to interpret the contracts between the railroad companies and The Pullman Company and has affirmed in that connection that said contracts impose on The Pullman Company the duty of furnishing sleeping cars on each train supervised by a Pullman employee having the rank and title of Pullman conductor. The Commission, in the same connection, has in effect declared that the obligation of said contracts referred to has been breached and that said breach constitutes an abuse and an undue and unreasonable disadvantage, prejudice and discrimination, and has in effect set up the said contracts as so interpreted by the Commission as furnishing a standard to determine what constitutes an abuse or an unreasonable and undue disadvantage, prejudice and discrimination. In this connection plaintiffs show:
- (a) That the Legislature has not devolved upon the Commission the power to interpret said contracts and to attempt to enforce said contracts under any given interpretation.
- (b) The Legislature has not declared that a violation or breach of said contracts constitutes an abuse or an unreasonable and undue disadvantage, prejudice and discrimination that may be corrected by proper orders of the Railroad Commission. The Commission is without power or authority to adopt the said contracts as interpreted by it

as furnishing a proper basis for and measure of its regulatory powers in attempting to prevent abuses or unreasonable, extortionate or undue disadvantage, prejudice, and discrimination in rates.

- [fol. 34] (c) That said contracts do not require that sleeping cars be in charge of and supervised by Pullman employees having the rank and title of Pullman conductors, and the interpretation placed upon the contracts by the Commission is wholly unwarranted.
- (d) That the action of the Commission in attempting to enforce said contracts in the way attempted by said orders and under the unwarranted interpretation referred to constitutes, in effect, an impairment of the obligation of said contracts, in violation of that provision of the Constitution of the United States denying to any State the power to pass any law "impairing the obligation of confracts." (Sec. 10, Art. I.)
- 36. By reason of the facts hereinabove stated, the Commission's order herein challenged is invalid and unenforceable in this:
- a. The order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas.
- b. If the statutes relied upon by the Railroad Commission as the source of authority for promulgating the order have been properly construed by the Commission, and if said statutes do attempt or purport to confer such authority, the statutes themselves are void and unenforceable in that they supply no standard, guide or criterion limiting the Commission's powers; and such statutes, as so construed, constitute an attempt to delegate to the Commission purely legislative power, which by Article II, Section 1, and by Article III, Section 1, of the Constitution of the State of Texas, has been granted exclusively to the Legislature.
- c. In so far as the order is grounded in the Commission's authority to regulate transportation rates or to prohibit unjust discrimination or extortion in rates, it is void for the reason that it was issued without notice of hearing for such purpose. In no circumstances has the Commission [fol. 35] statutory power to issue such an order except after ten days' notice and hearing. The enforcement of such an

order, issued without notice and hearing, would deprive plaintiffs of their property and rights without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

- d. The order is unjust, unreasonable, arbitrary, capricious and unsupported by any basis in fact, and bears no reasonable relation to the accomplishment of any purpose within the regulatory powers of the Railroad Commission or within the legitimate police power of the State. For that reason, plaintiffs are entitled to have it set aside pursuant to Articles 6453 and 6454, Revised Civil Statutes of 1925; moreover, for the same reason it is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it will deprive the plaintiffs of their property without due process of law.
- e. The order is beyond the authority delegated to the Railroad Commission by any law of the State, and, being penal in nature, in connection with the oppressive penalty statutes mentioned above in this Complaint, is violative of the due process clause, Section 1 of the Fourteenth Amendment to the Constitution of the United States.
- f. Said order as applied to the plaintiffs, and particularly in the operation of interstate trains, and in transporting and rendering service to interstate passengers, constitutes an unreasonable, oppressive, arbitrary and unnecessary burden upon and interference with interstate commerce, in violation of the commerce clause (Art. I, Sec. 8) of the Constitution of the United States; and is in conflict with the laws of the United States, and with valid orders of the Interstate Commerce Commission governing transportation of passengers in interstate commerce.

[fol. 36] g. Said order is invalid and unenforceable against the Trustee plaintiffs hereinabove named in that it constitutes an unlawful interference with the performance of their duties as officers of the United States Courts in the management, operation and control of the railroad properties in the custody of said courts, respectively; and is violative of the decrees of said courts in respect of the operation of said properties.

h. Said order works an unreasonable discrimination against the plaintiffs and their employees, and particularly

the employees of The Pullman Company, and thereby denies to the plaintiffs, particularly The Pullman Company and its employees, the equal protection of the laws, and deprives the plaintiffs and their employees of the liberty of contract, without due process of law, and against the equal protection of the laws; and thereby said order violates the due process and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

i. Said order, by requiring that the said The Pullman Company and the plaintiff railroad companies and Trustees have an employee on the cars referred to in said order having the rank and title of conductor, unreasonably, and without any necessity grounded in fact, arbitrarily and capriciously interferes with the right of The Pullman Company and the plaintiff railroad companies and Trustees to manage their respective businesses and to give to their employees such rank and title as to said companies may seem proper or desirable. Such unreasonable and unnecessary interference with such right deprives the said plaintiffs of their property and of the right to manage and use their property, without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 37] j. The order is arbitrary, unreasonable, unconstitutional and void for each and all of the reasons elsewhere stated in this Complaint.

- 37. Premises considered, plaintiffs pray:
- (1) That process be issued and served upon the defendants herein, in accordance with applicable statutes and rules of court. That service be had upon the defendant Railroad Commission of Texas by serving C. F. Petet, its Secretary, who resides in the City of Austin, in Travis County, Texas.
- (2) That, pending the hearing and action on plaintiff's prayer herein for preliminary or temporary injunction, this Court, after hearing, upon notice of not more than five days, enter its temporary restraining order, restraining and prohibiting the defendants Railroad Commission of Texas, and the members of said Commission, and the Attorney General of Texas, and their agents, employees, and representa-

tives, from attempting to enforce against the plaintiffs, or any of them, the above described orders of the Railroad Commission as set forth in Exhibits "A" and "F," and from instituting or prosecuting any penalty suit or action of any kind against any of the plaintiffs herein for the violation of said orders.

- (3) That upon a hearing after due notice, a reliminary injunction issue out of and under the seal of this Court, enjoining the defendants Railroad Commission of Texas and the members thereof, their representatives, agents, servants and employees, and the Attorney General of the State of Texas and his representatives, agents and employees from attempting to enforce against the plaintiffs, or any of them, the aforesaid orders of said Commission as set forth in Exhibits "A" and "F" of this Complaint, and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or otherwise, for the violation of said orders, or any part thereof. Plaintiffs pray that a [fol. 38] specially constituted district court be assembled pursuant to Section 266 of the Judicial Code, as amended (Sec. 380, U. S. Code), for the purpose of hearing and determining plaintiffs' motion herein for temporary or preliminary injunction; and for the purpose of conducting a final trial herein.
- (4) That upon final trial and final hearing of this suit the preliminary injunction as prayed for herein be made permanent, and that a decree be entered herein setting aside, vacating and annulling the aforesaid orders of the Railroad Commission as set forth in Exhibits "A" and "F"; and that the defendants Railroad Commission of Texas and the members thereof and their representatives, agents, and employees, and the Attorney General of Texas and his representatives, agents and employees, be permanently enjoined from enforcing said orders against plaintiffs, or any of them, and from taking any steps whatsoever looking to enforcement of same, and from seeking in any way to penalize plaintiffs or any of them for violating or not obeying said Commission orders, or any part thereof.
- (5) Plaintiffs pray for judgment against the defendants for costs of suit and for such other and further relief as the

evidence shall justify and as to this Court shall seem equi-

table in the premises.

R. S. Shapard, Attorney for plaintiff The Texas and Pacific Railway Company; Andrews, Kelley, Kurth & Campbell, Attorneys for plaintiffs Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor; Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor; Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor; Guy A. Thompson, Trustee, San Antonio, Uvalde & Gulf Railroad [fol. 39] Company, Debtor; Baker, Botts, Andrews & Wharton, John P. Bullington, Attorneys for plaintiff Texas and New Orleans Railroad Company; Terry, Cavin & Mills, Attorneys for plaintiffs The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company; Charles C. Huff, Attorney for plaintiff Missouri-Kansas-Texas Railroad Company of Texas: Walker, Smith & Shannon, Attorneys for plaintiffs Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees, The Chicago, Rock Island and Pacific Railway Company, Debtor: A. H. Kiskaddon, Locke, Locke, Strc 1d & Randolph, Attorneys for plaintiff Berryman Henwood, Trustee, St. Louis Southwestern Railway Company of Texas, Debtor: Allen & Gambill, Attorneys for plaintiff St. Louis, San Francisco and Texas Railway Company; F. H. Moore, Attorney for plaintiff The Kansas City Southern Railway Company: Thompson & Barwise, Fred L. Wallace, Attorneys for plaintiff Fort Worth and Denver City Railway Company; (S.) Claude Pollard (Address: Austin. Texas), Attorney for all plaintiffs excepting The [fol. 40] Pullman Company; Lowell M. Greenlaw, Herbert S. Anderson, Charles L. Black, John W. Stayton, Ireland Graves, (S.) Ireland Graves (Address: Austin, Texas), Attorneys for plaintiff The Pullman Company.

Duly sworn to by D. A. Crawford. Jurat omitted in printing.

### [fol. 41] Exhibits to Amended Complaint

#### EXHIBIT "A"

### Passenger Circular No. 164

By the Railroad Commission of the State of Texas Relating to the Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars within the State of Texas.

Pursuant to the authority vested in the Railroad Commission of Texas by the Statutes as interpreted by our courts, and particularly in the case of Missouri, Kansas & Texas Ry. Co. of Texas vs. State, 275 SWR 673 (681) wherein the court said:

"The Railroad Commission of Texas is a constitutional board or tribunal created for the specific purpose of supervising and controlling the operations of railroads within this state. The duty of its members is to become acquainted with and to know the transportation problems and conditions generally as to each railroad. Railroad regulation in every aspect is within its jurisdiction. Sovereignty granted it power to hear and determine all subject-matter of railroad regulation. Its powers are far-reaching and important,"

And by virtue of the interpretation by the courts of our state as to the degree of care required of carriers as to passengers, wherein the courts have used such statements as:

"A very high decree of care and watchfulness." La. Ry. & Nav. Co. vs. Smith, 285 SW. 1104; T. & P. Ry. Co. vs. Story, 83 SW. 852.

[fol. 42] "A high degree of care." M. K. & T. vs. Brown, 135 SW. 1076.

"A highest degree of care." Galveston H. & S. A. Ry. Co. vs. Bibb, 172 SW. 178.

The Commission is of the opinion that it is necessary in the public interest of citizens of this state who ride in Pullman cars and pay an extra fare therefor in addition to the regular charge for riding in the coaches as provided for passenger service, that those citizens riding in Pullman cars are entitled to the protection, safety and convenience of having a Pullman conductor in charge of said car while said

citizens are riding as passengers thereon.

It Is, Therefore, Ordered, Adjudged and Decreed that from and after the effective date of this order no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor.

The use of the terms "firm" or "corporation" as employed in the next preceding paragraph hereinabove is meant to include all companies as defined by Article 6479 Revised Civil Statutes of Texas.

It Is Further Ordered that this order shall be and become effective on September 1, 1939.

Done and ordered by the Railroad Commission of the State of Texas in Austin on this 8th day of August, 1939.

Railroad Commission of Texas, Lon A. Smith, Chairman, Ernest O. Thompson, Commissioner, Jerry Sadler, Commissioner.

Attest: C. F. Petet, Secretary.

[fol. 43]

Ехнівіт "В"

Docket No. 3669-R

By the Railroad Commission of the State of Texas Relating to the Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars Within the State of Texas

Austin, Texas, August 19, 1939.

It is Ordered by the Railroad Commission of Texas that notice be, and the same is hereby given to the Pullman Company as well as to all other interested parties, that the Commission will on August 31, 1939, in its Hearing Room at the

Capitol Building in Austin, take up and consider the matter of operating Sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor.

The Commission will, at said hearing, hear all facts and statements that may be presented pertaining to the matter above set forth and will, in pursuance of said hearing and of the facts there presented and the conditions then shown to exist, enter such order or orders in the premises and within the scope of the proposition involved as, in its opinion may be just, proper and equitable to all interests concerned.

It is further ordered that the effective date of Passenger Circular No. 164, issued by the Railroad Commission of Texas on August 8, 1939, be and it is hereby extended to September 15, 1939.

[fol. 44] Railroad Commission of Texas, by Lon A. Smith, Chairman, Ernest O. Thompson, Jerry Sadler, Commissioners.

Attest: C. F. Petet, Secretary. (Seal.)

### Ехнівіт "С"

### Docket No. 3669-R

By the Railroad Commission of the State of Texas Relating to the Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars Within the State of Texas

# Austin, Texas, September 6, 1939.

It appearing that the transcript of the record of the hearing that was held by C. F. Petet, as examiner, on August 31, and September 1, 1939, pursuant to the Commission's order of August 19, 1939, has not been completed; and it further appearing that after the transcript shall have been completed and delivered to the members of the Commission, additional time will be needed to consider the transcript,

it is further ordered by the Railroad Commission of Texas that the effective date of Passenger Circular 164 issued by the Commission on August 8, 1939, is further postponed to October 5th, 1939.

Railroad Commission of Texas, by Lon A. Smith, Chairman; Ernest O. Thompson, Commissioner;

Jerry Sadler, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

[fol. 45]

Ехнівіт "D"

Docket No. 3669-R

By the Railroad Commission of the State of Texas Relating & to the Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars Within the State of Texas

Austin, Texas, September 3, 1939.

In order to provide more time for examination of the record in the above numbered and entitled cause, it is ordered by the Railroad Commission of Texas, on its own motion, that the effective date of Passenger Circular No. 164, issued August 8, 1939, postponed to September 15th, and subsequently postponed to October 5, 1939, be and the same is hereby further postponed to November 1, 1939.

Railroad Commission of Texas, by Lon A. Smith, Chairman; Ernest O. Thompson, Commissioner;

Jerry Sadler, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

Ехнівіт "Е"

Docket No. 3669-R

By the Railroad Commission of the State of Texas Relating to the Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars Within the State of Texas

Austin, Texas, October 27, 1939.

In order to provide more time for examination of the [fol. 46] record in the above numbered and entitled cause,

it is Ordered by the Railroad Commission of Texas, on its own motion, that the effective date of Passenger Circular No. 164, issued August 8, 1939, postponed to September 15, October 5, and November 1, 1939, respectively, be and the same is hereby further postponed to November 15, 1939.

Railroad Commission of Texas, by Lon A. Smith, Chairman; Ernest O. Thompson, Commissioner;

Jerry Sadler, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

### Ехнівіт "F"

#### Railroad Commission of Texas

#### Docket No. 3669-R

In Re Order by the Railroad Commission of Texas Relating to the Safety, Care, Comfort, Convenience, Proper Accommodation, Charges, Fares and Transportation of Passengers on Sleeping Cars and Pullman Cars Within the State of Texas, and to Prevent Abuses, Unjust Discrimination and Extortion in Rates

### Austin, Texas, November 4, 1939.

Order amending passenger circular No. 164, issued by the Railroad Commission of Texas on the 8th day of August, 1939. After proper notice to all interested parties as [fol. 47] to the time and place of said hearing, then all parties at interest appeared by their respective attorneys and evidence was offered by all parties and after a full, final and complete hearing thereon, the order of August 8th was amended as hereinafter provided relating to the safety, care, comfort, convenience, proper accommodations, charges, fares and transportation of passengers on sleeping cars and Pullman cars within the State of Texas, and to prevent abuses, unjust discrimination and extortion in rates.

### Ordered

On the 31st day of August, 1939, came on to be heard the above entitled and numbered cause, whereupon the Commission proceeded to examine the notice of the hearing and found:

(1) That an order had been issued by this Commission on the 8th day of August, 1939, on its own motion, which provided in part as follows:

"No sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

and that the effective date of said order was fixed as of September 1, 1939.

- (2) That upon request of the Pullman Company, through its attorney, a notice was issued in the manner and form provided by law, notifying all parties at interest that a full and complete hearing would be held in Austin, Texas, in the Hearing Room of the Railroad Commission on the 31st day of August, 1939, at which time all parties interested would be permitted to offer such evidence and present such facts as they may deem material to the issues involved.
- (3) That the effective date of passenger circular No. 164 was extended until the 15th day of September, 1939, and [fol. 48] upon request of counsel for the parties at interest, the effective date of said order has been postponed from time to time, the last extension thereof being until the 15th day of November, 1939.
- (4) The Commission further finds that on the 31st day of August, 1939, at 10 o'clock A. M. in the Hearing Room of the Commission in Austin, Texas, the following appearances were made:

Mr. Ireland Graves, of the law firm of Black, Graves & Stayton, of Austin, Texas,

Mr. L. M. Greenlaw, general counsel of the Pullman

Company, Chicago, Illinois,

Mr. H. S. Anderson, assistant general solicitor of the Pullman Company, of Chicago, Illinois,

All on behalf of the Pullman Company.

Mr. Claude Pollard, Austin, Texas, representing all Texas railroads.

Culbertson & Morgan, attorneys, Fort Worth, Texas, appearing for the Order of Sleeping Car Conductors.

The Commission thus finds that all of the parties interested in the subject matter have been duly notified for the time and in the manner provided by law and that all of said parties entered an appearance in this cause and, with all parties having announced ready, the Commission proceeded to hear the oral testimony of seventeen witnesses, some of whom were offered by the railroad companies, the Pullman companies and the other parties at interest, as well as documentary evidence, and after a full, final and complete hearing of evidence, which lasted for two days, and after argument of counsel, the Commission being fully advised in the premises Finds:

- [fol. 49] (1) The Pullman Company has made agreements with the railfoads of Texas by the terms of which it is obligated to furnish standard sleeping and parlor cars, properly equipped and acceptable to the railroad company, sufficient to meet the requirements of travel over the lines of railroads operated by said companies in Texas and under such contract it has the exclusive right to operate pullman cars and sleepers over the railways in Texas, except that the railroads should have the right to operate their own parlor cars, either exclusively or in addition to the parlor cars furnished by the Pullman Company.
- (2) The contracts between the Pullman Company and the railroads provide that the Pullman Company shall have the right to collect from the occupants of its care for the use of seats, berths and rooms therein such fares as shall be charged on competing lines of railroads.
- (3) While the various contracts differ as to the compensation the railroads are to receive from the Pullman Company for this exclusive right to furnish such cars and services, they all provide in substance that all receipts from operations above a given sum per car per annum shall be divided between the railway company and the Pullman Company in various and graduated proportions. The railroad companies are thus directly interested in the charges made by the Pullman Company for the use of its seats and services to the extent of sharing in the profits over and

above a given amount per car per annum and this indirectly amounts to a tariff charge or additional compensation to the railroads for the privilege of riding in cars and obtaining services rendered by the Pullman Company under such contracts. All of this is in addition to the extra fare required to be paid by a passenger before he can have the privilege of purchasing a seat in and the accommodations provided by the pullman cars.

- [fol. 50] (4) The contracts between the Pullman Company and the railroads require that the Pullman Company shall provide suitable employees for collecting fares and providing the usual sleeping and parlor car service and such employees shall be subject to the rules of the railroad company governing its own employees and be subject to removal or transfer on complaint of the railroad companies because of unsatisfactory service, but in no ease should they be deemed or taken to be the servants or employees of the railroad company.
- (5) In addition to the employees to be furnished who would be subject to the rules of the railroad company, the contracts further provide that the Pullman Company, in order to maintain service acceptable to the railroad companies and the traveling public, should furnish agents or inspectors to supervise the conduct of employees, cleanliness of cars, etc., while enroute. It has been the custom for the Pullman Company to furnish Pullman conductors to supervise the conduct of employees and the cleanliness of the cars, etc., while enroute, and they have not furnished any other agent to supervise such conduct of employees and cleanliness of the cars except Pullman conductors. In recent months, the Pullman Company has failed and refused to furnish any agent or agents to supervise the conduct of its employees or the cleanliness of the cars while enroute but instead in a great many instances, they have left only a colored Pullman porter in charge of such cars, without any kind of inspection or supervision of the employees and cleanliness of cars while enroute. The same charge is made for the seat and other accommodations in the Pullman cars where there is no such supervision provided and only a colored porter in charge as is made for the same accommodations in cars in which supervision is provided by Pullman conductors. Among other runs on which such colored Pullman porter is the only person in charge of such

- cars is the Missouri-Kansas-Texas Railroad Company of Texas from San Antonio to Waco, over which there is a [fol. 51] heavy traffic and on which many students of the University of Texas and other colleges and universities ride, both boys and girls, and which carries football teams and other athletic teams from such colleges and universities. These groups are sometimes difficult to control and it would be impossible for a colored porter to keep proper order and decorum and provide the usual, customary and necessary safety, comfort, convenience and accommodation for the passengers on the sleeping cars and other pullman cars.
- (6) Under the contracts, the Pullman Company is to receive its pay based upon the average receipts per car per annum of all of the pullman cars operated over all of the lines of the respective railroads and not for any given line or lines or isolated or localized parts thereof, so that the cost of any particular operation is spread over the whole of the lines of the respective carriers, and in some instances the Pullman Company is guaranteed a minimum return of a fixed sum per car per annum.
- (7) The railroads of Texas are charging the maximum sum allowed by the Statutes of this state for passengers who desire to ride in sleeping cars or pullman cars, namely 3¢ per mile. This charge is made and collected by the railroad companies. In addition thereto, sleeping car companies or the Pullman Company collects an extra fare for the privilege of riding in pullman cars. Lower rates are charged by the railroads for the privilege of riding in the day coaches or chair cars. The schedule of rates or fares as collected by the railroad companies is common between two points regardless of the railroad that may haul the traffic. The same rates are charged by the railroad company and the same additional toll is exacted by the Pullman Company when a pullman conductor is in charge of the pullman cars as when a negro porter is in charge of the pullman cars.
- [fol. 52] (8) The Commission finds from the evidence that there are seventeen separate and distinct operations on the various railroads in Texas without pullman conductors in charge of pullman cars. The Commission further finds that all other runs other than the seventeen operations disclosed by the evidence, do have a pullman conductor in charge of

the pullman cars; that the failure to have Pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pullman conductors; that in every instance the same rates and fares are exacted by the railroad companies and the Pullman Company and in one instance the services of a Pullman conductor are offered and in the other instances enumerated, namely, the seventeen operations, such services are not rendered.

- (9) In this connection, the Commission further finds that old people, women, and children who ride as passengers and pay the additional fare for the privilege of riding in Pullman cars are entitled to the services and protection of a Pullman conductor, and the failure on the part of the railroad companies and that of the Pullman companies to thus provide such service and protection to such passengers is an abuse, a disadvantage and an undue and unjust discrimination against all passengers who ride on any one or more of said seventeen operations where Pullman conductors are not used.
- (10) The Commission finds that the contracts as made between the Pullman Company and that of the railroad companies as hereinabove referred to in these findings were made for the use and benefit not only of the railroads and the Pullman Company as to their own financial problems, but likewise for the use and benefit of third persons, namely, passengers who are willing to pay the fare charged by the railroad company and that of the Pullman Company for the privilege of using such service; that from the evidence of [fol. 53] the witnesses brought before the Commission who were paying passengers on Pullman cars, the Commission finds that the passengers in Texas who use the Pullman cars pay the extra fare because they are paying for, among other things, the services of a Pullman conductor.
- (11) That to allow the railroad companies to exact the extra rate to ride in Pullman cars and then to allow the Pullman Company to exact an additional fare over and above said extra rate per mile, which charges and rates are higher than that charged by the railroad companies for the privilege of riding as a passenger in other parts of the train, and then for the railroad company not to provide

the services and protection to the passengers in a Pullman car of a Pullman conductor, is an abuse, and undue and unreasonable prejudice and discrimination.

- (12) The Commission further finds from the evidence offered by the railroad companies and from the evidence offered by the Pullman Company that the only objection to passenger circular No. 164 was an economic one and nothing more.
- (13) Pullman conductors are especially trained by the Pullman Company to render a special type service to passengers riding in the Pullman cars. Each conductor is furnished with a book of instructions setting forth in detail the requirements of a conductor, together with special bulletins which are issued from time to time as to the safety. protection, care and convenience of the passengers. Special \* schools of instructions are conducted for the benefit of Pullman conductors quarterly to keep the conductors advised from time to time of additional safety devices and of all physical improvements on the cars, and such new and additional services as may be possible to be rendered to the passengers by the conductors from time to time; that such books of instructions and bulletins are furnished to only Pullman conductors and the schools of instructions are attended only by Pullman conductors; that the same [fol. 54] are not attended by Train Conductors or Pullman porters and that the Pullman conductor must have such training and such special qualifications before he is qualified to serve as a Pullman conductor; that the duties of a Pullman conductor are many, and the Commission finds that some of their duties are as follows:
- (a) See that the Pullman cars are properly cooled or properly heated for the reception of passengers prior to the time that the cars may be opened to receive passengers.
  - (b) To require all porters to be in proper uniform.
- (c) To regulate the temperature, both of the air-conditioning device and the heat equipment, and the Commission finds in connection with the air-conditioning that such equipment is relatively new, having been in use only a few years on the railroads in Texas; that the proper regulation thereof is a matter of grave concern to the health, comfort and convenience of the passengers on Pullman cars; that

the Pullman conductor is specifically charged with the responsibility of regulating the same and that he receives special instructions in the operation of the same.

- (d) The Pullman conductor is required to give special attention and care to old people, children, sick persons and college girls, as well as other types which require personal service and who are committed to his special care and attention: that often-times old women who are blind and unable to care for themselves are placed on the train under the care of the Pullman conductor and it is necessary for him to attend to their every need and want, to require their meals to be served at their seat and see that they reach their proper destination, provide them with wheel chairs and such other service as may be necessary. Likewise, children of tender years unable to care for themselves are committed to the care of the Pullman conductor and that it is his duty to properly attend children while enroute and to deliver them safely to their relatives, friends or proper [fol. 55] authorities at the end of their trip; that frequently the Pullman conductor is required to administer first aid treatment for passengers who become ill and when necessary it is his duty to make the necessary arrangements to summon a physician to attend such passengers. Special duties are required of the Pullman conductor in the event of a wreck. He must attempt to remove all passengers from the car to a place of safety and to minister to their injuries, if any, summon medical attention and perform every service that he can for their safety, convenience and comfort.
- (e) It is his duty to furnish information about schedules of connecting lines and all other means of transportation such as boats, airplanes and buses.
- (f) Crippled or deformed persons, mentally or physically, are committed to his special care and attention and it is his duty to personally attend to their needs.
- (g) It is the duty of the Pullman conductor to maintain proper decorum in the cars and to supervise all of the Pullman cars on the train. He must handle all disorderly conduct and prevent excessive drinking, boisterous talking and undesired attentions between passengers.

- (h) When switching is being done and the Pullman cars are separated from their chair cars, it is the duty of the conductor to see that the tail gates are properly erected and to prevent passengers from falling and becoming injured, and possibly fatally injured.
- (i) It is his duty to see that all passengers are assigned to the proper berths; that the cars are kept clean at all times; and it is his duty to supervise the pullman porters and see that they carry out the duties required of them.
- (j) Pullman conductor collects tariff rates for a seat in the Pullman car in the day time and for a berth at night. He does not permit any passenger to ride in the Pullman car unless such passenger has a pass or has paid the rail-[fol. 56] road transportation required to ride in Pullman cars, and in addition thereto the tariff required to ride in Pullman cars.
- (k) The Pullman conductor and the Pullman porter are furnished keys to the Pullman cars but such keys are not furnished to the train conductor.
- (14) The extra fare per mile charged by the railroads to passengers who ride in the sleeper car is to enable the passenger to enjoy the cervices, safety, convenience and comfort of the Pullman sleeping cars as contracted to be furnished to the traveling public in the various contracts between the railroads in Texas and the Pullman Company. One of the features contributing to such services, safety, convenience and comfort is the supervision of the work of the employees and the cleanliness of the cars while enroute, which is usually done by a Pullman conductor. The leaving of such sleeping cars and the operation and cleanliness thereof to negro porters with no agent or inspector to supervise the same while the cars are enroute is in violation of the contracts made for the benefit of the traveling public and the passengers who desire to pay the added fare to obtain the benefits of such contracts and such added safety service, comfort and convenience; and is to the undue and unreasonable disadvantage and prejudice of such passengers. Such additional fare so charged by the railroads for the privilege of claiming the benefits of such contracts and the added safety, comfort and convenience of having the same supervised while the cars are enroute by a Pull-

man conductor or other agent or inspector of the Pullman Company, are unfair, unjust and undue and unreasonable discrimination and prejudice and to the unreasonable disadvantage of the passengers who pay the same and do not obtain the service, safety, convenience and comfort of a Pullman conductor in supervising the work of the employees and the cleanliness of the cars enroute in accordance with such contracts. The traveling public by reason of the con-[fol. 57] tracts and the supervisory services of Pullman conductors in such cars purchase such accommodations and pay the extra fare and cost thereof to receive such benefits thereof and have the right to expect and receive the same.

- (15) The Commission finds the duties of a Pullman porter are:
  - (a) To load and unload all baggage.
- (b) To keep the car clean, to shine shoes and to do any other janitor work which may be required.
  - (c) To provide passengers with tables when requested.
- (16) The Commission further finds from the evidence that the porters on Pullman cars are negro men.
- (17) The Commission further finds that if negro porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with that there is imminent danger of insults to the lady passengers on the Pullman cars and that such condition exists in the seventeen operations by the Pullman Company where they do not use conductors, as hereinabove referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination; that from the evidence of the lady passengers who testified before this Commission, the womanhood of Texas entertains a fear of serious bodily injury or personal attack from a negro man and that to subject them as passengers in Pullman cars to the service where there is only a negro porter in charge would be to such passengers, as well as all other passengers, an undue and unjust discrimination, prejudice and abuse.
- (18) The Commission further finds that the disorderly conduct among passengers which sometimes occurs on Pullman cars in Texas can not properly be met or handled by a Pullman porter; that every Texan, both man and woman,

resents any interference or instructions from a negro man or from a negro porter, and the Commission finds that a [fol. 58] negro porter would not attempt to and could not discipline a passenger on a car nor would he attempt to prevent any misconduct in such car and if the same should be indulged in to the humiliation of the other passengers on such car, that the same could not be prevented nor quieted by a Pullman porter, while the same could be properly handled and quieted by a Pullman conductor and therefore the same would be an abuse and an undue and unjust prejudice, discrimination and disadvantage.

- (19) The Commission further finds that the custom is developing in the State of Texas by the railroads and the Pullman companies to place negro porters in charge of the Pullman cars, and to dispense with the service of the Pullman conductors; that during the year 1939, the Forms as prepared and issued by the Pullman Company where there is a negro porter in charge, have been changed from "Conductor in Charge" to the present form "Porter in Charge" and that such forms are in the nature of a receipt given to passengers to buy a seat or a berth on the Pullman cars; that the practice of taking off of the trains the Pullman conductors and substituting in their place the Pullman porters, and requiring such porters to perform their own duties, and in addition thereto, the duties of the conductor, is unfair, unjust and a discrimination, prejudice and disadvantage to the passengers riding on the Pullman cars in Texas.
- (20) That such changes from "conductor in charge" to that of "porter in charge" have been made during the year 1938 on the runs by the Missouri-Kansas-Texas Railroad Company of Texas from Fort Worth to San Antonio and from San Antonio to Waco, which trains serve the cities of Fort Worth to San Antonio and all intermediate points where there is located universities and colleges such as The University of Texas, Baylor University, St. Mary's, Texas Christian University and Texas Wesleyan College and others, and where students and their families travel to and from such institutions, and in this connection the Com-[fol. 59] mission further finds from the testimony offered by the Pullman Company that definite instructions are given to the negro porters to advise all passengers that he is in charge of the car and that they are so trained and in-

structed when they use porters in charge for such porters to advise the traveling public and tell them that he is in charge of such cars, and that in such instances the porter is expected to perform not only the janitor service of a porter but also he is required by the Pullman Company and the railroad to perform all services of a Pullman conductor.

- (21) The Commission further finds that in most instances the chair cars, as provided by the railroad companies offer to its passengers the same degree of safety and convenience, including air-conditioning, as that offered by the Pullman Company and that in addition thereto the chair cars as provided by the railroad company always offer the service of a train conductor and brakeman, and in many instances that of a train porter; that the Pullman cars in nearly very instance are attached to the main train and are placed on the rear of the train to which Pullman cars the train conductor does not have a key; that the Pullman cars are thus isolated from the other parts of the train; that the passengers on the chair cars are not'permitted to go into the Pullman cars and that the protection, care, attention and service thus rendered to the passengers on the chair car is superior to and exceeds the protection, care, attention and service in a Pullman car when there is no Pullman conductor in charge, notwithstanding the railroad companies exact a higher fare to ride in Pullman cars and the Pullman Company exacts an additional fare therefor. Therefore, this constitutes an abuse, an undue and unjust discrimination, prejudice and disadvantage. In this connection, the Commission further firds from the evidence that the passengers who ride on the trains and pay the fare [fol. 60] therefor prefer to ride in the chair cars where they have the protection, care, safety and service of a train conductor to that of riding in the Pullman car where there is a porter in charge, regardless of the rate which might be charged.
- (22) The Commission further finds from the testimony of citizens of this State who voluntarily appeared to testify and who were not associated with or connected with any railroad or sleeping car company that
- (a) Such witnesses understand that they were required to pay an extra railroad fare to ride in a Pullman car, over and above the fare required to ride in the chair cars on

the same train; that in addition to this extra fare they were required to pay an additional charge of tariff rates for the privilege of riding in the Pullman cars; that such extra fare was paid because of the convenience, safety, protection and service in the Pullman cars, including the services of a Pullman conductor.

- (b) The Commission further finds from the testimony of the witnesses who frequently ride on the trains and on the Pullman cars that such passengers expect to find both a Pullman conductor and Pullman porter on the Pullman cars; that such passengers understand that they are paying extra for such service and that they do look exclusively to the Pullman conductor for protection, care and service while they are riding as passengers on the Pullman cars.
- (c) The Commission finds that the experience of such passengers with the porter in charge has been unsatisfactory; that the construction of the Pullman cars is such that only little curtains protect the passengers one from another, and that there is a long aisle down the center of the Pullman cars, and the seats and berths are constructed alongside of the aisle, and each berth is separated from the other berths only by these small curtains, and that the lady [fol. 61] passengers who occupy such expect and are entitled to the protection, care and service of a Pullman conductor while they are thus traveling, and that to deny them such protection, care and service is an unjust discrimination on the part of the railroads and the Pullman Company.
- (d) The Commission further finds that women prefer not to ride in Pullman cars unless there is a Pullman conductor in charge; that they are unwilling to subject themselves to the supervision of a negro porter and that the practice on the part of the railroad companies and that of the Pullman companies in having the porter in charge is unfair, unjust and unreasonable, so far as these women passengers are concerned.
- (e) The Commission further finds from the testimony that the mothers of small children in Texas are unwilling to permit their children to ride in Pullman cars where only negro porters are in charge; that they entertain a fear that the children would not be cared for nor protected; that the

children of Texas are entitled to the comfort, convenience and service of Pullman cars and that to deny them of this service by failing to provide the necessary employees over and above that of a porter would be an unjust discrimination.

(23) That the rules promulgated by the railroad companies of Texas provide that the conductor shall have general direction and government of the passenger train, but notwithstanding such rule, in some instances, the train conductor never goes into the Pullman cars while the same are in transit and that he spends his time in the chair cars and never attempts to exercise any supervision over sleeping cars unless called to do so by the Pullman conductor.

(24) The duties of a train conductor are numerous. He is required to receive and execute all orders relating to the movement of the train; he must attend to the loading and unloading of all passengers as well as all baggage, mail and [fol. 62] express; that the many duties required of the train conductor consume all of his time and that he does not have time to supervise the Pullman cars on the trains: that many of the trains in Texas are very long that the regular equipment on one of the trains consists of 18 cars and some times extra cars; that he must familiarize himself with general orders and bulletins issued by the separate officers from time to time and see that his train is properly placed in the station; that he receives orders and clearances, looks after baggage, mail and express, and see that same has been properly loaded from the trucks to the cars, and that loading has been completed; that he furnishes the engineer with a copy of orders, as well as the brakeman or flagman; that he reads the same to the train porter; that he rides back of the train if the train backs in or out of the station; that after leaving the station he lifts the transportation by starting in the Jim Crow car and works back; that in some cases he goes into the Pullman cars and lifts the train transportation; that he also looks out for the trains and sees that the orders are fulfilled; that meeting points are made and that the stations are not passed ahead of time; that he sees that the Board is clear; that it is his duty when trains are meeting each other to see that his train is on the proper track. He is required to get off the train at every local station to assist passengers, no matter how big or how little the town may

be. He has supervision over the brakemen and porters. He receives additional instructions from time to time at various stations as the train passes on its journey.

- (25) That it is impossible for the train conductor to perform all the duties required of him in the operation of the train and likewise perform the additional duties of a Pullman conductor. That it is the custom for the train conductor to require the Pullman conductor in many instances [fol. 63] to collect the train tickets and to deliver them to the train conductor or send them to him by the train porter, and in these instances, the train conductor never goes into the Pullman cars at all. In other instances the train conductor simply collects the tickets in the Pullman cars and never returns thereto unless upon special request of the Pullman conductor; that the train conductor never renders any service to the passengers on the Pullman cars, except when he is specifically requested to do so by the Pullman conductor.
- (26) The Commission finds from all of the evidence introduced that the many duties required of a train conductor demand all of his time; that as a practical matter he does not have time to render any service to the passengers in the Pullman cars and as a matter of fact the train conductor does not render any service of any character to passengers on the Pullman cars in Texas. In this connection, the Commission further finds that when the Pullman cars are being operated without the services of a conductor that the passengers on Pullman cars are thus deprived of the services and protection of a conductor and that the passengers riding in the chair cars who have paid less fare to ride therein do have the services of a white conductor; that the same constitutes an abuse and unjust discrimination.
- offered that on different occasions Pullman porters while on duty proceeded to drink excessively and become intoxicated, thereby rendering themselves unable to perform the janitor work required of a Pullman porter, and certainly unable to perform the duties of a Pullman conductor.
- (28) The foregoing acts and things done and performed by the railroads of Texas and the Pullman Company are in violation of Articles 4005, 4013 and 6474, Revised Statutes 1925, which provide that such railroads and sleeping.

[fol. 64] car companies shall not collect a fare or compensation for any greater or less rate or amount than is charged all persons under substantially the same circumstances and conditions.

(29) The foregoing acts and things done and performed by the railroads of Texas and the Pullman Company are unjust and unreasonable and amount to unjust and unreasonable charges for the services rendered by a colored porter alone in charge of a sleeping car. And such service is inadequate to provide for the proper comfort, safety and convenience of the passengers therein and does not meet the requirements of the traveling public and the agreement between the railroads and the Pullman Company.

It Is, Therefore, Ordered, Adjudged and Decreed that it is necessary in order to correct the abuses aforesaid and eliminate the existing unreasonable and undue disadvantage, prejudice and discrimination to such described traffic that the services, safety, convenience and comfort for which such extra fare is paid and as contracted between the railroads and the Pullman Company be provided, and that failure to provide it is to the unreasonable and undue disadvantage and prejudice to and a discrimination against the said passengers as described, and would be charging a fare for which contracted services are not performed.

It Is Further Ordered, Adjudged and Decreed that if such services as contracted to be provided should be furnished by having all sleeping cars on each train supervised by a Pullman conductor while enroute as is the usual and general practice of the Pullman Company, that such abuse will be corrected and prevented and such unreasonable and undue disadvantage, prejudice and discrimination to such named traffic be eliminated and prevented in the future.

[fol. 65] It is Further Ordered, Adjudged and Decreed that no extra fare shall be charged or collected by the railroads from passengers for the privilege of occupying Pullman sleeping cars unless the facilities and employees and supervision of the work of employees and cleanliness of cars is provided while cars are enroute, all as provided by the terms of the respective contracts with the Pullman Company, are fully provided.

It is Further Ordered, Adjudged and Decreed that no extra fare or charge shall be made by the railroads or The

Pullman Company for the accommodations of passengers in a Pullman sleeping car, as provided for by the various contracts between the railroads and the Pullman Company, in which fare or charge the railroad in question will receive or have any share or which may ultimately contribute to its having or receiving any remuneration whatsoever unless the employees of Pullman cars and the cleanliness thereof are supervised while enroute as provided in said contracts.

It is Further Ordered, Adjudged and Decreed that the supervision of the work of such employees in Pullman cars and the cleanliness thereof while enroute as has been rendered by Pullman conductors and as now set out in the Book of Instructions to Pullman conductors now furnished to such Pullman conductors by the Pullman Company and introduced as evidence in this case is such supervision as will meet the requirements of such contracts.

It is Further Ordered, Adjudged and Decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor.

[fol. 66] It is Further Ordered, Adjudged and Decreed that no railroad operating in the State of Texas shall discriminate against passengers in the Pullman cars as distinguished from the passengers in the chair cars.

It is Further Ordered, Adjudged and Decreed that no railroad in Texas shall allow any sleeping car or parlor car to be operated or pulled over its lines for the use and occupancy of paying passengers of such railroads unless the employees and services and the supervision of such employees and the cleanliness of cars are furnished, all as provided in the contracts between the Pullman Company and the failroads of Texas made for the benefit of the traveling public.

It is Further Ordered, Adjudged and Decreed that all railroad companies, receivers or trustees operating lines of railroads in Texas be and they are hereby required to furnish like service on each sleeping car operated over their lines of railway in Texas as that provided by said railway company, receiver or trustee for any other sleeping car so

operated.

It is Further Ordered, Adjudged and Decreed that all orders, rules and regulations that are in conflict with this order are, to the extent of such conflict, expressly repealed or amended to conform to this order.

It is Further Ordered, Adjudged and Decreed that if any section, portion, clause or part of this order is held invalid, the same shall not affect any other section, portion, clause or part hereof. Except as herein expressly provided, nothing herein shall modify, amend or repeal any order, rule or regulation of the Commission heretofore promulgated or adopted.

It is Further Ordered by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the [fol. 67] provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force.

It is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce.

The effective date of this order shall be December 1, 1939, and from and after said date all railroads of Texas shall be required to comply with the terms of this order, which is an amendment to passenger circular No. 164.

It is so Ordered, at Austin, Texas, on this the 4th day of November, A. D. 1939.

Railroad Commission of Texas, Lon A. Smith, Chairman; Jerry Sadler, Commissioner.

Attest: C. F. Petet, Secretary.

[fol.		Ехнівіт "С	1,			
Pull		Without P	ullman C	onductor in Stat	e of Tex	as '
line		From	Time	To 🥡	Time	Miles
	SOUTHERN PACIFIC LINES Texas & New Orleans RR					• •
3128	Terminals: Ft. Worth & Houston	Ft. Worth Ennis	10.35p 6.05a	Ennis Ft. Worth	12.15a 7.45a	56 56
	SANTA FE Atchinson, Topeka &					
2015	Santa Fe Ry. Co. Terminals: El Paso &					
9019	Albuquerque	El Paso	10 15n	La Tuna	10.50p	18
	and decides	La Tuna	6.52a	La Tuna El Paso	7.30a	18
. 1	MISSOURI PACIFIC LINES	-	. 1			-
	Beaumont, Sour Lake & Western Ry. Co.	/* · · · · · · · · · · · · · · · · · · ·		1-7		
3010	Terminals: New Orleans	1			4 "	
	& Oakland	Sabine River	4.20p	Houston	7.25p	117
		Houston '	8.20a	Sabine River	11.20a	117
	SAN ANTONIO, UVALDE &					1.
2749	GULF RR Co. Terminals: Dallas &					7
0110	Corpus Christi	San Antonio	8.30a	Corpus Christi	12.45n	150
		Corpus Christi	5.30p	San Antonio	9.45p	150
	St. Louis, Brownsville					
-	& Mexico Ry. Co.					
3/23	Terminals: St. Louis & Brownsville	Harlingen	.7 00a	Brownsville	7.55a	25
	Diowisvine	Brownsville		Harlingen	10.00p	
2 .	INTERNATIONAL-GREAT	1		azur m-Ben	то.оор	
	NORTHERN R. R. Co.		.:			
3309	Terminals: Galveston	Cl. 1	10 00-	YT	1: 70	
	& St. Louis	Galveston Houston		Houston Galveston	11.59a -2.40p	50 50
	TEXAS & PACIFIC	Housson	1.10p	Gaiveston	2.40p	. 30
	Texas & Pacific Ry. Co.					
3501	Terminals: St. Louis & .					
201	El Paso	Texarkana	3.00p	Marshall	4.25p	67
3531	Terminals: Ft. Worth & Memphis	Marshall	· 2.20a	Texarkana	4.10a	67
	ROCK ISLAND LINES				AR .	
	Chickago, Rock Island &					
2070	Pacific Ry. Co. Terminals: Oklahoma City		*			- 2
3070	& Amarillo	Texola	4 23a	Amarillo	7.40a	112
	W Minimino	Amarillo	10.00p		12.45a	112
fol.	69]		,	7		
	MISSOURI-KANSAS-			*		
	MISSOURI-KANSAS- TEXAS LINES					
	Missouri-Kansas-Texas					
	RR Co. of Texas					
3265	Terminals: San Antonio &					
	Kansas City	San Antonio		Ft. Worth	9.45p	280
2051	Terminals: Ft. Worth-St.	Waco	3.35p	San Antonio	9.00p	192
1020	Louis-Waco	Ft. Worth	3.50p	Denison	6.25p	96
	2000 11 000	Denison	7.00a	Waco	11.40a	186
3258	Terminals: Houston &					
	Wichita Falls	Ft. Worth	8.30a	Wichita Falls		177
		Wichita Falls	4.40p	Ft. Worth	10.00p	177

#### EXHIBIT "G"-Continued.

Pull-	Railroad	Without Pullman Conductor in State of Texas					
line		From	Time	То	Time	Miles	
3273	Terminals: San Antonio	: -/		,			
	& Kansas City	Denison Colbert	11.30a 6.40p	Colbert Denison	11.42a 7.05p	7	
	Frisco Lines St. Louis, San Francisco						
2424	& Texas Ry. Co. Terminals: Galveston &						
3424	Tulsa	Denison Platter	11.45a 6:47p	Platter Denison	12.05p 7.22p	11	
	St. Louis Southwestern Ry. Lines					-	
	St. Louis Southwestern Ry. Co. of Texas						
3370	Terminals: Memphis &						
	Dallas	Texarkana Dallas	5.00a 6.00p	Dallas Texarkana	9.25a 11.05p	193 193	
	KANSAS CITY SOUTHERN	2	•				
	LINES Kansas City Southern Ry. Co.			41			
3175	Terminals: Shreveport & Kansas City	Bloomburg	7.48p	The Red River	8.20p	- 31	
	•	The Red River	10.10a		10.40a	31	
6	Santa Fe Panhandle and Santa Fe Railway Co.						
3010	Terminals: New Orleans	* .	- ?		2		
A	& Oakland	Sweetwater Texico	10.20a 1.53p	Texico Sweetwater	3.40p 7.00p	210 210	
	Burlington Lines Fort Worth and Denver						
3106	City Ry. Co. Terminals: Dallas-Denver	Amarillo Texline	7.55a	Texline Amarillo	11.03a	117 117	
	*	1 exille	7.00p	Amarino	9.45p	117	

[fol. 70] [File endorsement omitted.]

### [fol. 71] IN UNITED STATES DISTRICT COURT

### . [Title omitted]

TEMPORARY RESTRAINING ORDER—Filed November 28, 1939

Hearing of the application of the plaintiffs in the above cause for temporary restraining order having been set for this date, came the plaintiffs by their attorneys, and pursuant to due notice came also the defendants by their attorney, the Attorney General of the State of Texas; and the parties announced ready for said hearing, and after hearing and considering the verified amended complaint, and the

argument of counsel; and it appearing that in the complaint the plaintiffs challenge the validity of certain orders of the Railroad Commission of Texas on Federal constitutional grounds and that substantial Federal questions are presented in the complaint and that this Court has jurisdiction of the parties and the subject-matter; and it having been made clearly to appear from specific facts shown by the verified complaint that, unless a temporary restraining order is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage, in that the order of the Railroad Commission dated August 8, 1939 (Exhibit A in the complaint) and the order of the Railroad Commission dated November 4, 1939 (Exhibit F in complaint), impose heavy burdens upon the plaintiffs beginning December 1, 1939; and the plaintiffs are entitled by the laws of the State of Texas to have said orders reviewed in a court of compe-[fol. 72] tent jurisdiction in Travis County, Texas, and that there is no provision in the State law or in the challenged orders suspending their enforcement pending such review, and that, in the absence of a temporary restraining order or injunction, plaintiffs will be subjected to prosecution for heavy, daily recurring, penalties for failing and refusing to obey said orders on and after December 1, 1939;

Wherefore, it is ordered that upon the filing by the plaintiffs of a good and sufficient bond in the sum of \$10,000,00 to be approved by the clerk of this Court, payable to the defendants named in the complaint, and conditioned that plaintiffs will answer for all damages and costs which the defendants may sustain in consequence of the issuance of this temporary restraining order, or of any extensions thereof, the clerk of the United States District Court for the Western District of Texas issue a temporary restraining order enjoining and restraining the defendants Railroad Commission of Texas and the members thereof and the Attorney General of the State of Texas, their respective representatives, agents, servants and employees, from attempting to enforce against the plaintiffs, or any of them, the aforesaid orders of the Railroad Commission of Texas (Exhibits A and F attached to the complaint), and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or otherwise, for violation of said orders, or any part thereof. And it is further ordered that said temporary restraining order shall remain in force only until the hearing and determination of the application for

interlocutory injunction upon notice. And it is further ordered that a statutory three judge court be convened at —, Texas, on the — day of —— 19—, at ——. m., for the purpose of hearing plaintiffs' application for interlocutory injunction; and that the defendants and the Governor [fol. 73] of Texas be given notice of said hearing as required by Section 380, Title 28, United States Code, and the clerk is directed to issue for service on said interested parties copies of this order.

Done at Waco, Texas, this the 28th day of November, A. D. 1939.

(S.) Charles A. Boynton, United States District Judge,

Ent'd: Civ. O. B. Vol. 1, page 53.

[File endorsement omitted.]

[fols. 74-76] Bond on restraining order for \$10,000.00 approved and filed November 28, 1939, omitted in printing.

## [fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING STATUTORY THREE-JUDGE COURT—Filed January 12, 1940

Plaintiffs having presented their Amended Complaint, daily verified, praying, among other things, for a preliminary of temporary injunction, enjoining certain orders of the Railroad Commission of Texas on Federal constitutional grounds; and it appearing to me upon considering said Amended Complaint that the matters therein presented are within the jurisdiction of a district court of three judges, as provided in Section 380, Title 28, U. S. Code (Section 266 of the Judicial Code, as amended), it is hereby ordered that the plaintiffs' application for said preliminary injunction as contained in their Amended Complaint shall be heard by a district court of three judges at Austin, Texas, in the court room in the United States Court Building, on February 12, 1940, at 9:30 A. M.; and for such purpose I hereby

call to my assistance the Honorable Edwin R. Holmes, United States Circuit Judge for the Fifth Circuit, and the Honorable James V. Allred, United States District Judge for the Southern District of Texas, to each of whom a copy of this order will be forwarded by the clerk of this court. The parties and the Governor of the State of Texas will be given notice of said hearing, and the clerk is directed to issue for service on the Governor of Texas a copy of this order, together with copy of said Amended Complaint; and to forward by mail a copy of this order to attorneys of record for the respective parties.

[fol. 78] Done at San Antonio, Texas, this 12th day of

January, 1940.

(S.) Robert J. McMillan, United States District Judge.

Ent'd: Civ. O. B., Vol. 1, page 57.

[File endorsement omitted.]

### [fol. 79] IN UNITED STATES DISTRICT COURT

WRIT TO SERVE COPY OF ORDER CONVENING STATUTORY THREE-JUDGE COURT AND AMENDED COMPLAINT—Filed January 17, 1940

The President of the United States of America to the Marshal of the Western District of Texas, Greeting:

You Are Hereby Commanded to Serve Honorable W. Lee O'Daniel, Governor of the State of Texas, with the accompanying

(1) Certified copy of Order Convening Statutory Three-Judge Court,

(2) Amended Complaint,

In Case No. 38 Civil Action and styled The Pullman Company, et al., vs. The Railroad Commission of Texas, et al., "Herein fail not, and due return of this Writ make."

Witness, the Honorable Robert J. McMillan, Judge of the United States District Court for the Western District of Texas, and the seal of said Court, at Austin, Texas, this 13th day of January, A. D. 1940.

Maxey Hart, Clerk of said Court. By Joe Steiner,

Deputy. (Seal.)

#### MARSHAL'S RETURN

Received this writ at Austin, Texas, on January 13, 1940, and on January 15, 1940, at Austin, Texas, I executed same by delivering to W. Lee O'Daniel, Governor of the State [fol. 80] of Texas, in person, a Certified copy of Order Convening Statutory Three-Judge Court and Amended Complaint, as I am herein commanded.

Guy McNamara, U. S. Marshal, by Oscar T. Martin,

Deputy.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

### [Title omitted]

DEFENDANTS' FIRST AMENDED MOTIONS TO DISMISS AND TO STRIKE CERTAIN PORTIONS OF COMPLAINT—Filed January 27, 1940

### To Said Honorable Court:

Now come the defendants, the Railroad Commission of Texas, and Lon A. Smith, Ernest O. Thompson, and Jerry Sadler, members of said Railroad Commission, and Gerald C. Mann, Attorney General of Texas, and in lieu of the motions heretofore filed on the 13th day of December, 1939, file and present these amended motions, as follows:

1

The defendants move to dismiss the action because the complaint fails to state a cause of action in favor of any plaintiff against any defendant upon which relief can be granted.

4

The defendants move to dismiss the action because the complaint shows that there is a misjoinder of plaintiffs and a misjoinder of causes of action, if any, because said complaint alleges that the enforcement of the orders in question, when applied to some of the plaintiffs, constitutes an interference with interstate commerce, and when applied to the other plaintiffs, does not constitute an interference with interstate commerce, and said complaint shows that the facts relied on by each plaintiff are distinct and different from those relied on by the other plaintiffs.

[fol. 82]

The defendants move to dismiss the action as against all plaintiffs for the reason that there is a misjoinder of parties-plaintiff, in that the relationship between the plaintiffs is not such that any one or more of the plaintiffs may take advantage of any alleged injury suffered by the other plaintiff; and, furthermore, the allegations in the plaintiffs' Bill of Complaint are not sufficient to show each plaintiff has individually suffered damages in an amount to give this Honorable Court jurisdiction.

.

The defendants move to dismiss the action, or in lieu thereof, to require a severance, because there is a misjoinder of causes of action, in that the cause of action asserted by each plaintiff (except The Pullman Company) is different from that asserted by the other plaintiffs, the order complained of applied to a different situation as respects each plaintiff, under different conditions, and with different results.

5

The defendants move to dismiss the action as against plaintiff The Pullman Company for the reason that the petition shows upon its face that such plaintiff has no such interest as would entitle it to maintain the action.

6

The defendants move to dismiss the action as against all plaintiffs, except The Pullman Company and one other, for the reason that there is a misjoinder of causes of action, in that the cause of action sought to be maintained by each plaintiff (except The Pullman Company) is different from the cause of action sought to be maintained by any other plaintiff.

The defendants move to dismiss the action because the complaint shows that the Railroad Commission of Texas [fol. 83] had authority under the statutes of Texas to enter

the orders and do the acts in question, and the complaint fails to alleged that there was insufficient evidence for no evidence before said Commission to support or justify said orders, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable.

8

The defendants move to dismiss the action because the complaint shows that the Railroad Commission of Texas had authority under the statutes of Texas to enter the orders and do the acts in question, and the complaint does not show that said order or the enforcement thereof constitutes unlawful interference with interstate commerce.

9

The defendants move to dismiss the action because the complaint shows that the Railroad Commission of Texas had authority under the statutes of Texas to enter the orders and do the acts in question, and the complaint does not show that said orders or the enforcement thereof constitute a taking of the plaintiffs' property "without due process of law."

10

The defendants move to dismiss the action because the complaint shows that the Railroad Commission of Texas had authority under the statutes of Texas to enter the orders and do the acts in question, and the complaint fails to allege that there was insufficient evidence or no evidence before said Commission to support or justify said order, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable, and the complaint does not show that [fol. 84] said order or the enforcement thereof constitutes an unlawful interference with interstate commerce, and the complaint does not show that said orders or the enforcement thereof constitute a taking of the plaintiff's property "without due process of law."

11

The defendants move to strike that part of paragraph No. 3 in the complaint alleging that the matter in con-

troversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00) as to plaintiffs jointly, for the reason that such allegation is wholly immaterial.

12

The defendants move to strike that part of paragraph No. 7 in the complaint alleging that "the latter order (Exhibit "F") contains many erroneous findings that are contrary to the facts," for the reason that such allegation is wholly immaterial since (1) if the action is merely an equitable one, and a collateral attack upon an order of the Railroad Commission of Texas, to-wit, the order dated November 4, 1939, a copy of which, marked Exhibit "F", is attached to plaintiffs' petition, then the sufficiency of the evidence to sustain such order cannot be attacked, and in particular in this manner, and since (2) if the action be deemed a statutory appeal from the order of the Railroad Commission under Article 6453, Revised Civil Statutes of Texas, the findings of the Railroad Commission cannot be attacked by an independent inquiry into the facts so found, since if such findings can be attacked it would be upon the only basis that there was no evidence before the Commission, or that there was not sufficient evidence before the Commission to sustain such findings.

13

The defendants move to strike from the complaint those allegations in paragraph No. 27 thereof to the effect that the [fol. 85] quality of service of Pullman cars is not diminished when Pullman conductor operation is not provided thereon, and that on trains where there is no Pullman conductor operation the service rendered to passengers is of the same character and quality as that accorded where Pullman conductors are operated, and the allegations contained in paragraph No. 28 of said complaint alleging that the facts do not warrant the conclusion that the quality of service rendered to its traveling patrons on the lines in Texas described in Exhibit "G" is inferior to that rendered on the lines that are accompanied by Pullman conductors, for the reason that such allegations are wholly immaterial. In this connection it is shown that if the action is an equitable one and a collateral attack upon the order of the Railroad Commission of Texas appealed from, then

the facts found by the Railroad Commission as a basis for its order are not subject to attack, particularly by an inquiry into such facts, and if such action be an appeal from the order of the Railroad Commission under Article 6453. Revised Civil Statutes, then an inquiry into such facts is likewise immaterial since if such findings could be attacked at all it would only be upon alleging and showing that there was no evidence before the Railroad Commission, or that the evidence was insufficient to sustain the finding of the Railroad Commission.

14

The defendants move to strike that part of paragraph No. 29 of said complaint alleging that the not amount of added expense (which would allegedly result from compliance with said order) after allowing such offset item could be approximately Thirty-three Thousand Dollars (\$33,000.00) per annum, for the reason that such allegation is wholly immaterial, and indefinite, and that no facts are alleged from which it may be determined what loss, if any, would be suffered by any particular plaintiff.

[fol. 86]

15

The defendants move to strike that part of paragraph No. 30 in said complaint alleging that the property rights that will be destroyed by the enforcement of said order are of the value of a sum exceeding Three Thousand Dollars (\$3,000.00) to plaintiffs jointly, for the reason that such allegation is immaterial, and since each of the plaintiffs has an independent action, the value to all of the plaintiffs jointly could not be considered as determining the jurisdictional question.

16

The defendants move to strike paragraph No. 18 of the complaint for the reason that same states conclusions only, it pleads no fact, is inflammatory and prejudicial, and is neither material nor relevant to any issue.

(S.) Gerald C. Mann, Attorney General of Texas. Cecil C. Rotsch, Assistant Attorney General. Lee Shoptaw, Assistant Attorney General. Glenn R. Lewis, Assistant Attorney General.

January 27, 1940.

The undersigned attorneys for the plaintiffs hereby acknowledge that on this date they received a copy of the above motions; and they have no objections to the filing of the same.

(S.) Ireland Graves, Attorney for The Pallman Company.

(S.) Claude Pollard, Attorney for all plaintiffs excepting The Pullman Company.

[fol. 87] [File endorsement omitted]

[fol. 88] IN UNITED STATES DISTRICT COURT

#### [Title omitted]

DEFENDANTS' ORIGINAL ANSWER-Filed December 13, 1939

To Said Honorable Court:

Now come the defendants, the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson, and Jerry Sadler, members of said Railroad Commission, and Gerald C. Mann, Attorney General of Texas, and present the following in defense to the cause of action sought to be maintained against them herein.

## First Defense

The complaint fails to state a cause of action in favor of any plaintiff against any defendant upon which relief can be granted.

## Second Defense

Defendants admit the allegations contained in Paragraphs Nos. 1, 4, 5, 6 and 7 of said petition, and admit all of paragraph 2 except the last sentence thereof, which last sentence is denied.

Defendants deny that the order, a copy of which, marked Exhibit "F", is attached to the complaint, contains erroneous findings that are contrary to the facts; otherwise, defendants admit the allegations contained in Paragraph No. 8 of the complaint.

[fol. 89] Defendants deny the allegations contained in Paragraph No. 9 of said complaint, but say that the findings mentioned in said Paragraph No. 9 formed a part of the grounds upon which the order dated November 4, 1939, was based, and in this connection these defendants say that the findings upon which the order was predicated appear from said order itself, a copy of which is attached to the complaint, marked Exhibit "F".

Defendants deny the allegations contained in Paragraph No. 10 of said complaint, and say that the facts are as shown

in the Exhibits attached to the complaint.

Defendants deny the allegations contained in Paragraph No. 11 of said complaint to the effect that the Railroad Commission, under existing conditions, is powerless to issue or enforce a tariff allowing the differential mentioned in said paragraph, and are without knowledge or information sufficient to form a belief as to the truth of the allegation that such a tariff would be in conflict with interstate tariffs approved by the Interstate Commerce Commission; otherwise, defendants admit the allegations contained in said Paragraph No. 11.

These defendants deny the allegations contained in Paragraphs Nos. 3, 12, 13, 14, 16 and 36 of said petition.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph No. 15 of the complaint to the effect that the contracts between The Pullman Company and the other plaintiffs have not been breached, and are not being breached, but are being fully performed to the entire satisfaction of the parties thereto, and to the effect that it is of no consequence to the passengers whether the railroads supply the sleeping car accommodations, or whether by means of contracts they cause such accommodations to be [fol. 90] furnished by The Pullman Company, and the other allegations contained in said Paragraph No. 15 these defendants deny.

If by the allegation in Paragraph No. 17 of the complaint that "the Commission has not found, and it is not a fact, that the Pullman porters on such runs are incompetent, or that Pullman porters on such runs are inherently, or, as a class, offensive, untrustwe thy, or unsatisfactory" it was meant to allege that the Commission had not found that the Pullman porters are incompetent or inherently, or, as a class, offensive, untrustworthy, or unsatisfactory for porter

service, then defendants admit the truth thereof; but if it was intended to thereby allege that the Commission had not found, and that it is not a fact, that Pullman porters are incompetent, or inherently, or, as a class, offensive, or unsatisfactory as Pullman porters, then the defendants deny the same. These defendants admit that occasional drunkenness is not confined to Pullman porters, nor to the negro race; otherwise, these defendants deny the allega-

tions contained in Paragraph No. 17.

Defendants deny that part of Paragraph No. 18 of said complaint alleging that "the Railroad Commission is issuing the challenged order has discriminated against certain employees of the Pullman Company, because they belong to the negro race". The allegation in said Paragraph No. 18 to the effect that the order will require the performance of certain services by members of the white race and thereby prevent the performance thereof by members of the negro race of certain compensation which they might earn in the absence of such order, is denied if such member or members of the negro race have acquired the rank, qualifications and training of Pullman conductor. The other allegations in

Paragraph No. 18 are denied.

[fol. 91] These defendants deny those allegations in Paragraph No. 19 of the complaint to the effect that the order in question burdens interstate commerce, and is in conflict with applicable passenger tariffs in force with the approval of the Interstate Commerce Commission, and further deny the allegations contained in said Paragraph No. 19 to the effect that the plaintiff railroad companies are entitled to transport passengers in the Pullman cars without being required to conform to the burdens of the challenged order. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph No. 19 to the effect that on the lines described in Exhibit "G" interstate passengers are transported in the Pullman cars, and that on some of them, notably those described as Pullman Line No. 3175, operating between Shreveport, Louisiana, and Kansas City, Missouri, the only passengers transported in the Pullman cars in the State of Texas are interstate passengers. Defendants admit that the challenged order contains the recitation attributed to it, and set out in quotations on page 21, in Paragraph No. 19 of said complaint. All other allegations contained in Paragraph No. 19 are denied by the defendants.

Defendants deny that part of paragraph No. 20 of the complaint alleging that "the challenged order, unless enjoined, will operate as an arbitrary and unreasonable interference with such right and will require the employment of additional Pullman employees whose employment is not warranted by the transportation demands", and defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the other allega-

tions contained in said Paragraph No. 20.

Defendants admit that the challenged order purports to prohibit the operation in the State of Texas of a Pullman [fol. 92] or sleeping car or cars as a part of a railroad passenger train, unless such cars while occupied by passengers are continuously in charge of a Pullman conductor, but they deny that all Pullman cars as an integral part of the train are at all times in charge of the train conductor, that is, the effective or actual charge. Defendants admit those allegations complained — in Paragraph No. 21 to the effect that at the present time a number of the regularly scheduled railroad passenger trains in the State of Texas, on which Pullman sleeping cars are operated, have no Pullman conductor on board during all or a portion of the operation. Defendants admit the allegations contained in said Paragraph No. 21 concerning and explanatory of Exhibit "G" attached to said complaint. Defendants are without sufficient knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph No. 21.

These defendants admit the allegations of fact contained. in Paragraph No. 22 of the complaint pertaining to Pullman Line No. 3273, on page 28; Pullman Line No. 3015, on page 28; Pullman Line No. 3531, at page 28. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Para. graph No. 22 pertaining to Pullman Line No. 3723 to the effect that compliance with the challenged order would require either two Pullman conductors on the train at the same time north of Harlingen, or would require the stationing of a Pullman conductor at either Brownsville or Harlingen for the purpose of traveling on the train between those points. The other allegations in said Paragraph No. 22 relating to Pullman Line No. 3723 are admitted. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation

in Paragraph No. 22 of the complaint pertaining to Pullman [fol. 93] Line 3128 to the effect that the operation has been in effect continuously since 1925. Defendants deny that compliance with the challenged order would require the unnecessary employment of an additional Pullman conductor to accompany the train between Fort Worth and Ennis. Other allegations contained in Paragraph No. 22, pertaining to Pullman Line No. 3128 are admitted. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph No. 22 with reference to Pullman Line No. 3258 to the effect that on the Pullman car between Fort Worth and Wichita Falls the line averages 2.3 passengers Northbound, and 3.4 passengers Southbound daily. Defendants admit the other allegations contained in said Paragraph No. 22 with reference to Pullman Line No. 3258. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph No. 22 of the complaint pertaining to Pullman Line No. 3309 to the effect that in the Pullman car between San Antonio and Corpus Christi the train averages daily three (3) passengers Northbound and four (4) passengers Southbound; otherwise, the allegations contained in said paragraph with reference to Pullman Line No. 3309 are admitted. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation with reference to Pullman Line No. 3501 in said Paragraph No. 22 that the method of operation from Texarkana to Marshall has been in effect for more than twelve (12) years. Defendants admit the allegations contained in Paragraph No. 22 of said complaint pertaining to Pullman Line No. 3424; Pullman Line No. 3273; Pullman Line No. 3015; and Pullman Line No. 3531. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that Pullman Line No. 3175 has operated between Shreveport and Kansas City without a Pullman conductor for a period of [fol. 94] approximately seven (7) years. The other allegations contained in said Paragraph No. 22 with reference to Pullman Line No. 3175 are admitted.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs Nos. 23 and 24 of said complaint.

Defendants deny those allegations contained in Paragraph No. 25 of the complaint to the effect that the need for

a Pullman conductor on a given train is determined by operating conditions affecting that train, including the volume of traffic, the length of the train with the consequent demands upon the time and services of the railroad and Pullman employees, and to the effect that the operations on which Pullman conductors are not now being used in Texas embrace runs of the kind described in said paragraph, and those in which traffic is light and where the revenue and other factors do not warrant the additional expense that would be incurred in providing Pullman conductors. this connection defendants show that other factors than those mentioned in said paragraph enter into the need of a Pullman conductor, and that such other factors do warrant the additional expense if any that would be incurred in providing Pullman conductors. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph No. 25.

Defendants admit that the duties set out in Paragraph No. 26 of the complaint of Pullman conductors are a part of the duties of such Pullman Conductors, but deny that those set forth are all of such duties, and defendants deny that one Pullman employee on the car is able to do all that is required to maintain the service, particularly if such employees is a negro porter. Defendants are without knowledge or information sufficient to form a belief as to [fol. 95] the truth of the allegations contained in said Paragraph No. 26 to the effect that the train conductor is in charge of the entire train, including the Pullman cars, and that all Pullman employees are subject to his orders, and that the rules governing the duties of Pullman employees require them to refer many matters of operation to the authority and discretion of the train conductor.

Defendants deny those allegations contained in Paragraph No. 27 of the complaint to the effect that the quality of Pullman car service is not diminished when Pullman conductor operation is not provided for the same, and deny that the character of service is the same whether the Pullman car is in charge of a Pullman conductor, or a Pullman porter, and deny that Pullman porters are qualified to perform the duties that would be performed by Pullman conductors if present. Defendants admit that the successful operation of The Pullman Company's business necessarily depends upon the company's maintaining a higher

quality of service to passengers. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph No. 27.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph No. 28 of the complaint to the effect that the Pullman Company's method of conducting its operations in Texas is similar to that employed elsewhere under similar conditions; otherwise, the allegations contained in said Paragraph No. 28 are denied.

Defendants deny the allegations contained in Paragraph No. 29 of the complaint to the effect that the order would cause a net added expense of approximately \$33,000.00 per annum to the Pullman Company. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said Paragraph No. 29.

[fol. 96] Defendants deny that allegation in Paragraph No. 30 of the complaint to the effect that the enforcement of the order complained of would unconstitutionally deprive the Pullman Company of any rights; otherwise, defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph No. 30.

Defendants deny the allegation contained in Paragraph No. 31 of the complaint to the effect that no complaints have arisen in Texas from the operation of cars without Pullman conductors, or from the conduct or services of Pullman porters on duty in such circumstances. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph No. 31.

Defendants admit the allegations contained in Paragraph No. 32 of the complaint to the effect that the operation of Pullman cars as integral parts of railroad trains is necessary to the conduct of the business of railroad passenger transportation, and to the effect that the railroads require sleeping car and other Pullman car accommodations for their passengers in order to meet the demands of the traveling public. Defendants are without information or knowledge sufficient to form a belief as to the remaining allegations in said Paragraph No. 32.

Defendants deny the allegation in Paragraph No. 33 of the complaint to the effect that the Pullman Company is not a common carrier, and is not engaged in business in Texas as a common carrier, and to the effect that the railroad Commission of Texas has no jurisdiction over and no duties to perform in respect of the Pullman Company. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said Paragraph No. 33.

[fol. 97] Defendants deny the allegations in Paragraph No. 34 of the complaint to the effect that the Railroad Commission had no authority or power to promulgate or to enforce the order complained of, and deny that plaintiffs have no adequate remedy at law. Other allegations in said

Paragraph No. 34 are admitted.

Defendants deny the strict correctness of the conclusions set forth at the outset of Paragraph No. 35 of the complaint, and down to 35-a, and say that the order of the Commission, copy of which is attached to the complaint as Exhibit "F", shows the correct basis for such action on the part of the Commission. All other allegations in said Paragraph No. 35 are depied, as well as all other allegations of fact contained in said complaint which have not been specifically touched upon above.

### Third Defense

These defendants say that the order of the Railroad Commission of Texas dated November 4, 1939, a copy of which is attached to the complaint as Exhibit "F" was entered after due notice of the hearing, that the facts therein found are true, that the Railroad Commission of Texas had before it ample and sufficient evidence sustaining the facts therein found, and that such order does not contravene the provisions of the Federal Constitution mentioned in the complaint, or any other Articles or Sections thereof, and that the Railroad Commission of Texas was acting within the authority of the Constitution and laws of the State of Texas.

Wherefore, these defendants pray that the relief sought by the plaintiffs in this cause be denied.

(s) Gerald C. Mann, Attorney General of Texas. Cecil C. Rotsch, Assistant Attorney General. Lee Shoptaw, Assistant Attorney General. Glenn R. Lewis, Assistant Attorney General, Austin, Texas.

[fol. 98] Copy received, December 13, 1939.

(s) Ireland Graves, Attorneys for The Pullman Company. Claude Pollard, Attorney For Other Plaintiffs.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

### [Title omitted]

ORDER GRANTING WARREN J. WEST, ALLEN HARVEY AND FIDELLA H. McBey-Pullman Porters, Leave to Intervene as Plaintiffs—Filed Feb. 19, 1940

The motion of Warren J. West, Allen Harvey and Fidella H. McBay for leave to intervene in this cause as plaintiffs is hereby granted.

Done in open Court this 17th day of February, 1940.

(s) Saml H. Sibley, United States Circuit Judge for the Fifth Circuit. Robert J. McMillan, United States District Judge. James V. Allred, United States District Judge.

Entered: Civ. O. B., Vol. 1, page 79

[File endorsement omitted.]

[fol. 100] IN UNITED STATES DISTRICT COURT

# [Title omitted]

COMPLAINT OF INTERVENER-PLAINTIFFS WARREN J. WEST, ET AL., PULLMAN PORTERS—Filed February 17, 1940

To the Honorable Judges of said Court:

Warren J. West, Allen Harvey and Fidella H. McBay, as intervener-plaintiffs, respectfully show to the Court:

1. The said Warren J. West is a resident of the City of San Antonio, in Bexar County, Texas; and Allen Harvey and Fidella H. McBay are residents of the City of Ft. Worth, in Tarrant County, Texas. Each of them is a citizen of the United States of America and of the State of Texas.

- 2. Intervener-plaintiffs hereby adopt the averments in the Amended Complaint of the plaintiffs herein, with the same effect as if they were set forth at length in this complaint.
- 3. Additionally, intervener-plaintiffs aver that they are regularly employed by The Pullman Company as porters, and that each is regularly assigned to trains that for at least a part of the route in the State of Texas are not accompanied by a Pullman conductor, and where such intervener-plaintiff is the only employee of The Pullman Company on the train. Such operations are known as porterin-charge runs, and for such service, in addition to the regular porter's salary, the porter-in-charge receives extra compensation from The Pullman Company of \$13.50 [fol. 101] per month, or approximately \$162.00 per annum. The enforcement of the Railroad Commission's order dated November 4, 1939, known as Passenger Circular 164 (Exhibit F in Plaintiff's Amended Complaint) would deprive each of the intervener-plaintiffs of said extra compensation.
- 4. Said Warren J. West is 62 years of age and has been regularly employed by The Pullman Company as a porter for a period of 20 years; the said Allen Harvey is 59 years of age and has been regularly employed by The Pullman Company as a porter for a period of 30 years; the said Fidella H. McBay is 49 years of age and has been regularly employed by The Pullman Company as a porter for 21 years. Each of the intervener-plaintiffs is in reasonably good health. Each of them will be entitled to retire from active service at the age of 65 years and thereafter will be entitled to receive monthly compensation or benefits pursuant to the Federal statute known as the Railroad Retire-The benefits that each will receive will be reduced if the salary that he receives from The Pullman Company during the term of his active service is reduced. Consequently, the enforcement of the said Passenger Circular No. 164 will injuriously affect each of the intervener-plaintiffs during the period of his active service and also thereafter during the period of his retirement.
- 5. No notice of the hearing held by the Railroad Commission on August 31, 1939, was given to any of these inter-

vener-plaintiffs or to any person then representing any of them. Intervener-plaintiffs had no knowledge that the hearing would be held, and did not attend said hearing in person or by representative.

- 6. For a number of years each of the intervener-plainiffs has been entrusted by The Pullman Company with the responsibility of serving as porter-in-charge on Pullman lines operating in and through the State of Texas. Passen-[fol. 102] gers on the Pullman cars are not subjected to the dangers or discriminations as found by the Railroad Commission in its Order (Passenger Circular 164 as amended), since the porters-in-charge have demonstrated in long years of service that they are men of good character, and are faithful, dependable, loyal and competent. Whether a man has these qualities is not determined by his race or color. The Pullman Company's patrons receive while on the cars in charge of intervener-plaintiffs and other porters exactly the same service that they receive when the porters are not in charge, and in no way is the standard of service lower in the former instance than it is in the latter.
- 7. As shown in said Amended Complaint, the said Railroad Commission's order, Amended Passenger Circular 164, will deny to each of the intervener-plaintiffs his rights as a porter-in-charge on the ground that he is a member of the colored or negro race, in violation of the equal protection clause and the due process clause of the 14th Amendment to the Constitution of the United States. For said reasons and for the reasons stated in Plaintiffs' Amended Complaint, said Railroad Commission order is invalid and unenforceable.

Wherefore, the intervener-plaintiffs hereby seek the relief prayed for in Plaintiffs' Amended Complaint.

(S.) Warren J. West, (S) Allen Harvey, (S) Fidella Hall McBay, Intervener-Plaintiffs. (S) Ireland Graves, Attorney for Intervener-Plaintiffs. Address: Norwood Building, Austin, Texas.

[File endorsement omitted.]

[fol. 103] IN UNITED STATES DISTRICT COURT

# [Title omitted]

APPLICATION OF M. B. CUNNINGHAM, ET AL., PULLMAN CONDUCTORS, TO INTERVENE—Filed Feb. 17, 1940

To Said Honorable Court:

Comes now M. B. Cunningham of Fort Worth, Texas, W. M. Hadley of San Antonio, Texas, W. A. Worley of Dallas, Texas, and file this their Application to Intervene in the above styled and numbered cause and with respect would show:

1

Your applicants are each engaged in the profession as Pullman Conductors; each of them are now employed by the Pullman Company, one of the plaintiffs in the above cause, and have been so employed for many years prior to the filing of this application. Your applicants file this application for intervention in this cause on their own behalf and that of all other Pullman Conductors desiring to join in such application and on behalf of the Order of Sleeping Car Conductors, which is an association composed of about 1500 men engaged in the profession as Pullman Conductors, and in this association there are approximately 90 per cent of all the Pullman Conductors engaged in the profession, and for grounds of intervention would show:

2

The subject matter of this litigation is Circular Order No. 164 promulgated by the Railroad Commission of Texas [fol. 104] relating to the safety, care, comfort, convenience, proper accommodation, charges, fares and transportation of passengers on sleeping cars and pullman cars within the State of Texas and to prevent abuses, unjust discrimination and extortion in rates. Such order was marked Exhibit "F" and attached to and made a part of the original complaint as filed by the plaintiffs in this cause, wherein such order was set out in full.

3

Your intervenors are materially interested in the determination by this Honorable Court as to whether or not said order of the Railroad Commission marked Exhibit "F" above referred to shall be enforced or not enforced, in that approximately ninety-five per cent of the Pullman Conductors who serve on the Pullman cars which are operated over the railroads of the State of Texas are members of the organization above referred to as the Order of Sleeping Car Conductors.

4

These intervenors would show that this application is accompanied by a pleading setting forth the claim for which this intervention is sought; that a copy of this application and such pleading have been delivered to all parties affected thereby.

Wherefore, your applicants respectfully pray that they be allowed to intervene in this cause.

Respectfully submitted: M. B. Cunningham, W. M. Hadley, W. A. Worley, Order of Sleeping Car Conductors, Intervenors. Culbertson & Morgan, Fort Worth, Texas, By Cecil A. Morgan, Attorneys for Intervenors. We interpose no objection: Black, Graves & Stayton, By Ireland Graves, Attorneys for Pullman Co. Claude Pollard, Attorneys for Railroads. Gerald C. Mann, Attorney General of Texas, By Glenn RaLewis, Cecil C. Rotsch, Assistants, Attorneys for Defendants.

[fol. 105] [File endorsement omitted.]

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEADINGS OF INTERVENORS M. B. CUNNINGHAM, ET AL., PULL-MAN CONDUCTORS—Filed Feb. 17, 1940

To Said Honorable Court:

Come now M. B. Cunningham, W. A. Worley and W. M. Hadley, on their own behalf and on behalf of all other Pullman conductors desiring to join herein, and on behalf of the association known as the Order of Sleeping Car Conductors, and with lease of the Court first had and obtained

file this their pleadings herein, and with respect would show:

I

Your Intervenors adopt the pleadings of the defendants, the Railroad Commission of Texas, and Lon A. Smith, Ernest O. Thompson and Jerry Sadler, members of said Railroad Commission, and Gerald C. Mann, Attorney General of Texas, and by such adoption do plead each and all of the facts as pleaded by said defendants as fully and to all intents and purposes as if the same were fully set forth herein.

 $\Pi$ 

Your Intervenors say that the order promulgated by the ·Railroad Commission of Texas under date of November 4. 1939, a copy of which has been attached to plaintiff's complaint as Exhibit No. "F" was entered after due notice to all interested parties as to the time and place of such hearing, and that all parties at interest, including all the plaintiffs, appeared by their respective attorneys, and evidence [fol. 107] was offered by all parties, and after the evidence was received and weighed, and after arguments were heard and considered, the Railroad Commission of Texas was thus advised of all of the material facts relating to the subject matter as contained in said Exhibit "F", and did then promulgate such order and that such order does not contravene any provisions of the Federal Constitution, or any article or section thereof nor any amendment thereto, nor is such order in violation of the State Constitution nor any article or section thereof or amendment thereto, nor is the same in violation of any of the Statutes of the State of Texas, but in strict compliance with and is supported by the Constitution of the United States and of the State of Texas and the Statutes thereof.

Wherefore, your Intervenors pray that the relief sought by the plaintiffs in this cause be denied.

Culbertson & Morgan, Fort Worth, Texas, By Cecil A. Morgan, Attorneys for Intervenors.

[File endorsement omitted.]

[fol. 108] IN UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF TEXAS

No. 38-Civil

THE PULLMAN COMPANY, ET AL.,

VS.

RAILROAD COMMISSION OF TEXAS, ET AL.

Statement of Evidence—Filed July 22, 1940

Be it remembered that on this 17th day of February, A. D. 1940, the above entitled and numbered cause came on for trial before the Honorable Samuel H. Sibley, United States Circuit Judge, Fifth Circuit, Honorable Robert J. McMillan, United States District Judge, Western District of Texas, and Honorable James V. Allred, United States District Judge, Southern District of Texas, at Austin, Texas, and continued from day to day to its conclusion; plaintiffs being represented by L. M. Greenlaw, Esq., and H. S. Anderson, Esq., of Chicago, Illinois, Claude Pollard, Esq., and Messrs. Black, Graves & Stayton of Austin, Texas; intervener plaintiffs (Pullman Porters) by Ireland Graves, Esq., of Austin, Texas; the defendants being represented by Cecil C. Rotsch, Esq., and Glenn R. Lewis, Esq., Assistant Attorney Generals of Austin, Texas; and the intervener (Order of Sleeping Car Conductors) being represented by Messrs. Culbertson & Morgan of Fort Worth, Texas; and during said trial the following testimony was introduced and proceedings had in connection therewith:

[fol. 109] PLAINTIFFS' EVIDENCE

CHAMP CARRY, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

- Q. Your name is Champ Carry?
- A. Yes, sir.
- Q. You are vice president of the Pullman Company in charge of the operating department?

A. Yes, sir.

Q. How long have you been connected with the Pullman Company and its affiliated companies?

A. About 21 years.

Q. How long have you been vice president in charge of operation?

A. Since May 1st, 1936, I believe.

Q. You are a resident of Chicago, Cooke County, Illinois? A. No, sir, I am a resident of Lake County, Mundeline, Illinois.

Q. How is that?

A. Lake County, Illinois, Mundeline, one of the suburbs of Chicago.

Q. Mundeline?

A. Yes, sir.

Q. Will you please tell us whether you are in charge of the department of the Pullman Company that has supervision over the employees that operate on the trains?

A. Yes, sir, that comes in the operating department. [fol. 110] Q. That comes in the operating department?

A. Yes, sir.

Q. Now, please tell us something about the system that the company has, showing what the functions of the various employees operating in your department are—that is to say, how do you go about maintaining an efficient organiza-

tion on the trains—do you have superintendents?

- A. Yes, sir, we have; in the first place, we have several departments, in Chicago; the car service department and the car service personnel; the yard department, the shops, and then out in the districts we have six zones under the supervision of a superintendent—a zone superintendent. Those zones are geographic territories arbitrarily arrived at so as to work out the least amount of traveling, and in those zones we have the districts, and agencies in charge of district superintendents or agents, depending on the amount of business done or the size of the office force; and under them, of course, we have inspectors of all zones, instructors, and a general organization necessary to carry on the business.
- Q. Do you have an assistant or one or more assistants in your office who have direct contact with the superintendents out in the various zones and in the districts?

A. I have two.

- Q. Who are they?
- A. Mr. Vroman and Mr. Gidney.

Q. B. H. Vroman? That is the gentleman who is one of the witnesses who have been sworn—

A. Yes, sir.

[fol. 111] Q. —as a proposed witness in this case?

A. Yes, sir.

Q. Now, he is in your office-

A. Yes, sir.

Q. -in Chicago?

A. Yes, sir.

Q. Now, then, what would be the next step under Mr. Vroman?

A. The next step under him would be the Zone Superintendents.

Q. Now, how many zone superintendents are there?

A. Six.

Q. Is there a zone superintendent in Texas?

A. Yes, sir, at Houston.

Q. Who is that, Mr. M. B. Osborne?

A. Yes, sir.

Q. How long has he been connected with the company?

A. I think it is over 25 years.

Q. Now, under the zone superintendents, what do you have.

A. District superintendents and agents.

Q. How many of them—how many district superintendents and agents do you have in Texas?

A. Well, you will have to let me think a minute-

Q. We can get that from Mr. Vroman later.

A. We have one at Dallas, one at Fort Worth, one at San Antonio, one at Houston—and Shreveport is outside of Texas. Mr. Vroman can give you that definitely.

Q. I will ask Mr. Vroman about that then.

A. All right.

Q. How long, Mr. Carry, has the company been operating certain trains or certain lines as you call them in charge

[fol. 112] of porters?

A. Well, as near as I can tell, going back into the records, it was in effect over 60 years ago; it was an order that we found in the records going back to 1877. Now, I don't know whether it was true before that or not, but apparently it has been true all the way through.

Q. Does the company operate in that way in other parts

of the State, or merely in Texas, at the present time?

A. You mean other parts of the Country?

Q. Other parts of the country; I beg your pardon?

A. Yes, sir, we operate that way every place that it is justified.

Q. Has the company adopted any policy of—or has it any plan of eliminating the conductor—

A. No, sir.

Q: -from its service?

A. No, sir, we use conductors wherever we figure a conductor is justified or wherever the service requirements justify it.

Q. And on the heavier trains—

A. Yes, sir.

Q. —carrying two or more pullman cars, as a rule conductors are employed?

A. As a rule, although I think there are some trains with two pullman cars where they are in charge of porters.

Q. Any of that kind of operating in Texas?

A. No, sir.

Q. All of the Texas operations in charge of porters are [fol. 113] one car operations?

A. Regularly, yes, sir; there may be an extra car at times when we have more business than can be handled in the regular line car when an extra car is put on in operation, putting a conductor; generally speaking we put a conductor on, depending on the conditions prevailing at that time.

. Q. Yes, sir. Approximately how many porters has the company in its employ?

A. Between nine and ten thousand. I can't give you the exact number.

Q. Mr. Vroman would have the figures, I take it?

A. Yes, sir. It fluctuates; we have some on furlough and I couldn't say what that would be at any one moment.

Q. The Pullman Company has contracts with the Railroads covering the operations of the pullman cars in the State of Texas and elsewhere?

A. Yes, sir.

Q. Is there any car operated—any pullman car operated on any railroad in Texas other than pursuant to a contract?

A. Not that I know of.

Q. You know the Railroads that are parties to this suit—

A. Yes, sir.

Q.—and that are involved in these porters-in-charge operations in Texas?

A. Yes, sir.

Q. All of these operations are under contracts between the Railroad—the particular Railroad and the Pullman Company?

A. Yes, sir, all of them.

[fol. 114] Q. Is there an arrangement in general between the Railroad and the Pullman Company whereby the Pullman Company and the Railroad share a part of the revenues from the Pullman fares on these cars?

A. All of our contracts provide for the Railroads to share in the earnings if they reach a certain level. The general provisions of the contracts are that the Pullman Company first takes out the cost of the operation and then what we term as an initial return or profit for doing the business, and after that we divide any surplus that may be there. The contracts are generally—there are some little differences in the way that the division is made, but they are generally to the effect that there will be a division if the revenue is there.

Q. Do the contracts also contain provisions whereby if the companies don't earn a minimum amount the Railroads will contribute toward making up the difference, or will make it up?

A. Some of them do, yes, sir; some of them provide that if the earnings are not equal to the expenses they will make up the difference between the earnings and the expenses.

Q. Mr. Carry, I will ask you if you have sufficient familiarity with the effect of the porter in charge operations, as contrasted with the operation of the Pullman cars in charge of Pullman conductors to be able to say whether in general the porter in charge operations are equal to or inferior to the other operations?

[fol. 115] Mr. Morgan: If Your Honors please, we object to a general leading question like that. Certainly it isn't confined to Texas, if he is going to ask it at all.

Judge Sibley: I expect we had better stick to Texas.

Judge Graves: All right.

Q. I will ask you to confine that to the State of Texas. I don't care for you to go into details; I just asked you the general question.

A. Would you mind repeating that question? I got a

little side-tracked here.

Q. The question is whether you have had occasion as the operating official of the company to determine whether the operations known as porter in charge operations in Texas have been equal to or inferior to the operations known as the conductor operations?

A. I certainly have; we study that all the time, and we are quite sensitive to the fact that if we do not have business we do not exist; so we follow this up, and if we didn't think

they were equal to it, we would change it.

Q. The contracts that you refer to are for a term of years—each one of them is for a term of years?

A. Yes, sir.

Q. Some of them expiring periodically?

A. They do; they are not made at any one time.

Q. Some of them expiring at the end of 1940?

A. Yes, sir.

Q. Some of the contracts have just been made---

A. Just been made for five years.

Q. —for a period of five years?

A. Yes, sir.

Q. Were those contracts that are now in existence made [fol. 116] at the time when the porter in charge operations were in existence?

A. Yes, sir; I don't think there is a single contract we have that was not made after porter in charge operations were in existence in the territory that the particular Rail-

roads operate in.

Q. Do you know, Mr. Carry, in what way the Pullman Company undertakes to supervise its service? I will direct your attention to the recital in this order that the only supervision that the company has over the Pullman porter is the supervision of the Pullman conductors and that when they are not on the trains there is no supervision or inspection.

A. Well, that, of course, is not so. We have, as I said before, we have the district offices, and the porters and conductors are all assigned to a district; they have seniority in the district, and they come under the direct supervision of the district supervisor or agent and his assistants; and in addition to that they have these district superintendents through the zone superintendent; they have inspectors, the passenger traffic department has inspectors, the yard department has inspectors, that all ride the trains and they are

all supervising the service; they supervise the porter service just as they supervise the conductor service.

Q. In addition to the district superintendent and zone superintendents do you have any inspectors whose duty it is to ride the trains and whose entire time is spent doing that?

A, Yes, sir.

Q. How many of them are there in Texas? [fol. 117] A. Well, there are two that work under the zone superintendent and one that works under the safety department, one that is under the yard department, and I

department, one that is under the yard department, and I believe there is one under the passenger traffic department.

ment.

Q. Now, it will develop, Mr. Carry, that two of these intervener plaintiffs operate out of Fort Worth and one of them operated out of San Antonio. Do you have a district superintendent at each of those places?

A. Yes, sir.

Q. Do you have any way of supervising the operation of the train at the initial point—for example, where these two men start on their run at Fort Worth, do you have any way of knowing whether they—when they report for duty to take the train or to go out with the train, whether they are in proper condition in every way?

A. Well, it is the definite duty of the district superintendent or his assistant to inspect every train before it leaves, to see whether the men are in proper condition and properly uniformed to go out and also that the car is in proper condition to go out. You know there is a lot to this service besides just the service on the train.

- Q. Suppose that the porter were to be late, or for some reason he should not be faithful to his duty, and should not be—or he should be sick, or for any other reason he is not fit to go out with the train, would there be somebody representing the Pullman Company at the station to place a substitute on the run?
  - A. Yes, sir.

Q. Would it or not be his duty to do that?

[fol. 118] A. It would definitely be.

- Q. Is that true at San Antonio and Fort Worth and Houston—
  - A. Yes, sir.

Q: -and Dallas?

A. Yes, sir.

Q. You have, in other words, not only the district superintendent but you have night men whose duty it is to be at the station before the train goes out?

A. Yes, sir, we have men that inspect all trains before

they leave.

Q. Now, you said something about the service rendered by the company to the passengers, in addition to the service rendered by the conductors and the porters. I would like

for you to explain that-what you mean by that.

A. Well, what I mean by that is that we feel it is a complete service, it has to start with a proper piece of equipment, but after you get that, the maintenance of that equipment is as important a part of our service as the service furnished on the cars,—the yard work, the cleaning, the painting, the general up-keep, taking care of the trucks, running a department for safety, periodical shopping of the cars, and all of those things are just as important as the men on the train, in our opinion, because they go to make up a complete service and if any one of them falls down there is possible justification for complaint.

Q. Now, you have told us something about the method employed by the Pullman Company in supervising the service. What precaution does the Pullman Company take to see to it that men of proper—of good character are

employed?

[fol. 119] A. Well, when we receive an application from any one we investigate as fully as we know how; in the case of porters in the larger districts, we have colored men of whom we know who go around and talk to the people who live in the neighborhood, and inspect their families and know all they can about them. If they are out in the country we would probably send a white man to do it; we could possibly even get more information that way; and after we get them there is a constant supervision from the time they enter the service, and if we find them falling down after taking all these precautions, why, we have to take the necessary action to maintain our standard.

- Q. Do you happen to know whether the porters operating in the State of Texas are Texas men?
  - A. To the best of my knowledge they are.

Q. They are?

A. About that—I say I am not positive about that.

Q. Who selects the men-do you select them in Chicago?

A. Oh, no, the men are selected by the local men who know them; the district superintendents select them.

"Q. How do you go about determining whether an operation shall be porter in charge operation or a conductor

operation?

A. Well, in most cases the district superintendent writes in and suggests that if it has been a conductor operation that the conditions warrant a change and that it be made into a porter in charge operation. We then send inspectors to go and ride the line and they very frequently talk to passengers who use the line frequently, and make a general [fol. 120] study of it. The district superintendent of course, would have it reported to the zone superintendent before it came into the Chicago office, and unless we had the full approval of the zone superintendent after his investigation, why, we would not do it; but we never order it from Chicago without the full approval of the local men who are thoroughly familiar with the conditions prevailing on that particular line.

Q. Do you maintain the conductor operations on all lines where it is your conclusion that conductors are needed for

the service?

A. Yes, sir.

Q. Do you happen to know what the extra pay is that the porter gets for his porter in charge service?

A. Thirteen dollars and fifty cents a month.

Q. Now, does he get that regardless of whether he is porter in charge for a portion of the run or for all of the run?

A. If he is porter in charge for a portion of the run he gets paid for the full round trip. That is a provision of

our agreement with the porters.

Q. Well, in other words, this porter that operates on this Brownsville road to which we have referred and who is on the car, I take it, from St. Louis to Brownsville and in charge for a distance of 25 miles, does he get the porter in charge compensation?

A. Yes, sir.

Q. Thirteen dollars and fifty cents a month?

A. Yes, sir.

Q. Do you know whether those jobs are given to the [fol. 121] older men—the men who have been in the employ

of the company for a long period of time and who have been tried and who have experience and have demonstrated

that they are competent?

A. That is always considered, because our agreement with the porters provides that seniority will prevail in the event fitness and ability is sufficient. Of course, the seniority prevailing means that the older men have the first chance at it, and it is only in the event these older men are not fit and able that we do not place them on the run; but we never go very far down the line.

Q. Well, under the agreement who has the authority to

determine whether they are fit and able?

A. The company.

Q. The company?

A. Yes, sir.

Q. Do you exercise that privilege?

A. We certainly do.

Judge Graves: That is all for the present. Judge Sibley: Cross-examine.

### Cross-examination.

# Questions by Mr. Lewis:

Q. Mr. Carry, briefly, what are the duties of a Pullman conductor?

A. His duties are to collect fares, and make assignments of space and generally to supervise the service on the train.

Q. And briefly what are the duties of a Pullman porter?

A. They help the passengers on the train, make up the [fol. 122] berths, and take care of their needs as far as they can and keep the car in good condition.

Q. The porters then performs mostly janitor service and

personal service to the passengers?

A. I don't consider them janitor services. That is done in the yards. He performs personal services for the passengers.

Q. In those lines where Pullman conductors are used, I presume that you consider they are needed?

A. In most cases, yes, sir.

Q. And are the Pullman porters on the lines where they are in charge, are they particularly a better class of people than the other porters whom you have employed in Texas?

A. I wouldn't say they are a better class but they certainly are the top rank.

Q. But you have large numbers of other porters who

would be just as good?

A. I think we have quite a number that would be qualified.

Q. Well, now, how much more does the Pullman conductor get for performing his services than a Pullman porter does when the porter is performing not only the porters services but also the Pullman conductor services?

A. I don't know that I understand you. You mean the difference between the total porter wages and the con-

ductors wages, or the thirteen dollars and a half?

Q. The full porters wages when he is acting as conductor, and the Pullman conductors wages, what is the difference between the two?

[fol. 123] A. Between 85 and a hundred dollars.

Q. The Pullman porters draw 85 and a hundred dollars a month?

A. Yes, sir.

Q. Now, your whole decision will depend upon the local conditions when you decide to remove the conductor and operate through a porter in charge?

A. Yes, sir.

Q. Wholly through local conditions and the local situation?

A. Yes, sir.

Q. Then, when you consider the question of removing a conductor and putting on a porter you wouldn't consider anything except that particular line that is in question?

A. That particular line and its effect, its general effect.

There are many things that apply to all lines.

Q. There would be things which would make it desirable to have a Pullman conductor in charge of those lines where conductors are not used——

A. I don't know of any.

Q. -isn't that true, Mr. Carry?

A. I don't know of any.

Q. You see no desirability whatsoever of having a Pullman conductor on those cars where a Pullman porter is in charge?

A. No, sir, I don't think there is any need.

- Q. Yet there is a need for the Pullman conductor of the ones where a Pullman conductor remains?
  - A. In most cases.

Q. For purposes of supervision?

A. Not necessarily.

Q. Well, do you mean to say that you don't need any

[fol. 124] supervision?

A. I don't think we do in those cases. In those small car lines of one or two cars where we have porters in charge I think we get plenty of supervision other than the conductor supervision.

Q. Where from?

A. The districts, the inspectors.

Q. Is that the only place where you get supervision?

A. From the whole organization, yes, sir.

- Q. You really get none from the train conductors do you?
- A. I don't know what you mean by supervision. They are in charge of the train.

Q. It is a theoretical proposition, though, isn't it, that

they are in charge?

- A. I wouldn't think so; the passengers pay the same rate and he is entitled to the same consideration from the train crew as he is in a Pullman car as in a coach. I don't see where it is theoretical.
- Q. Well, he doesn't receive any more service out of the train conductor when the Pullman porter is in charge than he does when the Pullman conductor is in charge, does he?

A. He might; it depends on his need.

Q. Well, does he?

A. You will have to name a specific case. I can't answer a general question of that kind.

Q. Do you depend to any extent upon the assistance from the train conductor when the Pullman conductor is not

in charge?

A. Yes, sir, and also when he is in charge.

Q. Well, do you depend on him any more when there isn't a Pullman conductor in charge than you do when there is, or not?

[fol. 125] A. No, I would say it is about a stand-off.

Q. So that the part that the train conductor plays and the train brakeman and the flagman, that has nothing to do with the need or not need of a Pullman conductor, does it?

A. If you are speaking of need, no.

Q. I mean in your own determination of the question.

A. If you say need, no; but the fact that he is there is

something; their riding in the car is a consideration that you cannot ignore; but it is such a rare case where you have any need to call on them it is hard to say that there is a need for him, but he is there and you can't ignore him from a practical standpoint.

Q. It is true, is it not, that all of the Pullman porters are

negro men?

A. Yes, sir.

Q. And all of the Pullman conductors are white men?

A. Yes, sir.

Q. Your reason is wholly an economic one, when you take

off a Pullman conductor, isn't that correct?

A. Well, I don't know, it probably is that we don't think it needs it; that is the reason we take it off; we just think it is — economical thing or a waste to have two men there when there is only need for one.

Q. The conductors work on a monthly salary, do they

not?

A. Yes, sir.

Q. I mean the Pullman conductors.

[fol. 126] A. A man who has a regular assignment works on a monthly salary; he works on a—

Q. And you are entitled to call on them for 240 hours of

service per month for their regular pay?

A. Yes, sir.

Q. And if they work longer than that they draw more pay?

A. Yes, sir.

Q. Now, it is true, is it not, that there are a large number of Pullman conductors in Texas who work by the month whom you don't call on?

A. Yes, sir, under our regular contract and agreement with the conductors, even though, it is short of the regular

assignment they get the full months pay.

Q. Now, if it were possible to use the extra—the unused of those conductors to operate those lines, you would be glad to do it?

A. We couldn't do it.

Q. You couldn't do it?

A. No, gir.

Q. If it were possible to do it, would you?

A. I don't know; of course, that is a question that I don't know what you mean because if you mean we work them more and not pay them any more, why that is one

thing; but we don't feel we need the service so there

wouldn't be any point in doing it.

Q. Who supervises the work of the employees and the cleanliness of the cars while the cars are en route, when a [fol. 127] Pullman conductor is not there?

A. If there is no inspector there, nobody does.

Q. Nobody does; it is left entirely with the porter?

A. But the point is that there are district people available at intervals along the line to see that it is up to standard.

Mr. Lewis: That is all.

(Four witnesses excused.)

Judge McMillan: How do you spell your name?

Mr. Carry: C-a-r-r-y.

Judge McMillan: Thank you.

Judge Sibley: Call your next witness. Mr. Graves: Mr. B. H. Vroman.

B. H. Vroman, a witness for plaintiff, having been duly sworn testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. Where do you live, Mr. Vroman?

A. Chicago, Illinois.

Q. What is your position with the Pullman Company?

A. Assistant to the vice president in charge of operation.

Q. How long have you been connected with the Pullman

Q. How long have you been connected with the Pullman company and in what position?

A. Well, it is not quite 35 years; I have had various

positions.

Q. Have you served as a district superintendent?

A. Yes, sir, from the year 1920 to 1938 at Denver, Colorado and then I came on to Chicago as zone superintendent, [fol. 128] and then in charge of the personnel department for a few years, and for the past four years as assistant to Mr. Carry.

Q. Have you ever served as a superintendent in Texas?

A. No, I served as an agent down at Galveston many years ago.

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Q. Do you personally know these porters that operate on these lines?

A. A good many of them, 1 all of them.

Q. Have you made—well, first I will ask you this, has there been in the past five years, we will say, an increase

in the operation of porter in charge operations?

A. I think there has been a slight increase; we don't keep a running record from day to day as to just how many porter in charge operations we have, but there has been a slight increase in recent years.

Q. Has there been any greater increase in proportion to the percentage of increase of porter in charge operations than there has been a decrease or a falling off in business?

A. No, sir, much less.

Q. Much less?

A. Yes, sir.

Q. How does business compare, we will say, in the end

of 1934 with what it was in the end of 1929?

A. Well, I think there has been more than 50 per cent decrease in the passengers handled, and I think the falling off in car operations and the same will apply to conductor requirements, about 42 or 43 per cent.

[fol. 129] Q. In other words, there has been a 50 per cent decrease in passengers hauled and a 50 per cent decrease in number of cars in operation, but a less decrease than that in the number of conductors employed?

A. The decrease of cars operated and conductor require-

ments have been just about the same.

Q. About the same?

A. And more than 50 per cent in passengers handled.

Q. Do those propositions hold good in the State of Texas as well as throughout the country?

A. Yes, sir.

Q. Do you know how long the porter in charge operations have been in effect by the company?

A. Well, as Mr. Carry testified, they have been in effect

for 60 years or more.

Q. How long have they been in effect in the State of Texas?

A. Well, I have a record of some of them for 21 or 2 years; a number of them for 15 years or 20 years.

Q. Are these porters that operate on these lines that are involved in this suit, are they Texas men?

A. Every one.

Q. State whether or not it is your business to supervise the service and to maintain such supervision as may be necessary to maintain the standard of the service?

A. Well, the direct supervision of the service throughout

the country comes under the zone superintendents.

Q. Well, whom do they operate under?

A. They operate under Mr. Carry's supervision. [fol. 130] Q. And you are his assistant?

A. Yes, sir.

Q. Have you made an investigation of the records of the company with a view of determining these—a comparison between the service rendered by the porter in charge and the service rendered on cars where conductors are in charge?

A. We have, very definitely.

Q. Have you made that investigation over a period of more than a year?

A. Yes, sir.

Q. How far back did you go in your study?

A. It is a continuous proposition; we are covering the service all the time; we have inspectors in every zone that do nothing but ride the lines and make reports. So it is a constant supervision.

Q. I will ask you to state whether from the standpoint of the company, the service rendered by porters in charge in the State of Texas is equal to or inferior to the service rendered on these cars—or other cars in charge of Pullman conductors?

Mr. Lewis: If the Court please, may we make an objection at this point, that is, that the complaint in this case does not allege that the Commission's findings to the effect that this service of Pullman conductors is needed was not based upon substantial evidence. There is no attack whatsoever made upon the findings of the Commission in that regard, and we think the Commission's order would have to be taken for its face value in that respect, and we object to the introduction of further evidence of this nature.

[fol. 131] Judge Sibley: Do you regard it as a sort of resadjudicata proposition or just presumption?

Mr. Lewis: We regard it as a presumption.

Judge Sibley: Well, I think it is that, but wouldn't they have a right, if they could, to show that in point of fact there is no basis for any such conclusion.

Mr. Lewis: Your Honor, they have not made any allegation of facts, only as a conclusion; they merely allege there

isn't a need for Pullman conductor service. They have

made no allegation as a basis—

Judge Sibley: Well, the general finding was that there was a need, that the passengers paid their money and usually get so and so and ought to have it on one run the same as the other.

Mr. Lewis: Yes, sir, Your Honor, and I will point out to that all of these Railroads and the Pullman Company were present at the proceedings before the Commission.

Judge Sibley: I don't think there is any res adjudicata

about it.

Mr. Lewis: I am not sure about that, Your Honor. On this point I am afraid I might be wrong about this question. The Court a while ago stated that you could not have an appeal from an order of the Railroad Commission to the Federal Court. I might be wrong about it but I think you can, and I think—

Judge Sibley: Well, it depends on the nature of your appeal and the Texas law. I don't know what it is. If it is [fol. 132] really a judicial suit, why you might bring it perhaps in a Federal Court but if it is a strict appeal, I don't

think you could.

Mr. Lewis: The statute provides for the filing of a suit

in a Court of competent jurisdiction.

Judge Sibley: Yes, the Federal Court immediately takes

jurisdiction under such circumstances.

Mr. Lewis: And under those circumstances we think it is incumbent on the parties to allege that the Railroad Commission was without a basis for its findings.

Judge Allred: To allege it and show it?

Mr. Lewis: That is right. We-

Judge Sibley: I don't know but what they are proving

about what you say they do allege.

Mr. Lewis: They allege that, Your Honor, but I think they would have to allege that the Commission did not have substantial evidence on which to base their findings. Now, they have not alleged that so far as—

Judge McMillan: They allege that the action of the Com-

mission is unreasonable and confiscatory.

Mr. Lewis: They merely allege in general terms, Your Honor, that Pullman conductors are not needed; that it would cause a useless expense.

Judge McMillan: I know but don't they draw the general conclusion that the order of the Commission is un-

reasonable?

Mr. Lewis: Yes.

Judge McMillan: They wouldn't have to plead their evidence. Couldn't they support that with evidence? [fol. 133] Mr. Lewis: They were passed after the pro-

ceedings before the Commission.

Judge McMillan: Well, that same question comes up before every Three Judge Court; that is a contention on the part of the Attorney General that we are bound by the findings of the Commission and we can't consider any evidence except the evidence before the Railroad Commission. Well, that has been ruled on adversely and never has been up-set yet. It may be that we are wrong about it.

. Mr. Lewis: Well, that seems to me to be still doubtful and

we want to preserve our objection in that case.

Judge Sibley: Well, we will hear the evidence. Mr. Graves: Was the question arswered?

The Reporter: No, sir, no answer has been made. I will read the question to the witness.

(Thereupon the Reporter read the question as follows: "I will ask you to state whether from the standpoint of the company, the service rendered by porters in charge in the State of Texas is equal to or inferior to the service rendered on these cars—or other cars in charge of Pullman conductors?")

A. My answer is it is.

Q. The service rendered4

A. On the cars in Texas is equal to what it is in other parts of the country.

Mr. Lewis: Your Honor, is it in line to ask that this objection and exception be taken to similar testimony throughout?

Judge Sibley: That will be all right, sir.

[fol. 134] Mr. Graves: I understand that what counsel means by that, may it please the Court, is that he objects to our going into this evidence for the reason that we do not challenge this order on the ground that it was not based on substantial evidence heard by the Railroad Commission. If that is the point—

Judge Allred: In other words, that your pleadings are not

sufficient to justify this evidence?

Mr. Graves: Yes, si.

Judge Allred: I think that is his position.

Mr. Graves: Yes, sir, that the order should be tested by what was heard by the Commission and not by what is heard

by the Court here.

Mr. Culbertson: Your Honor, may we amplify that briefly. This is not a trial de novo on the constitutional grounds. If it were a trial de novo and a diversity of citizenship, then there would be no question but what we could try this case de novo as to all the issues; but it is being attacked on constitutional grounds, and they simply bring up a question disputing what the Railroad Commission found against them. The Supreme Court of the United States says that is simply a disputable issue of fact found by the Railroad Commission and this Court should not overturn it. And we want the objection to go to all of the evidence which would have to do other than with the constitutional questions involved here.

Judge Sibley: Well, the constitutional question is pretty broad; whether it is purely arbitrary and without any basis

that is one constitutional question.

[fol. 135] Mr. Culbertson: We think so but we don't think it is more than—

Judge Sibley: Well, he says the service is smooth and good enough, but whether he can keep the operations and all those things are other questions. The Railroad Commission didn't think a negro porter could keep the peace in a car. I don't know whether there is any trouble like that in Texas.

Mr. Culbertson: That is a disputable question.

Judge Sibley: Well, the trouble is the Commission couldn't try the constitutional question; that is not its business; that is the business of the Court and we are obliged to try it when we start into it. So ahead and ask the questions.

Q. Mr. Vroman, you have answered as to a comparison between service rendered on the porter in charge lines in Texas with the services rendered on other lines outside of Texas. What I want to direct your attention to is comparison between the porter in charge service and the service rendered on those lines—with the services rendered on lines that are accompanied by a Pullman conductor. Tell us whether or not there is any difference, and if so, which is the superior.

A. Our reports indicate that the service is just as good on the porter in charge lines as it is on lines where we have

the supervision of conductors.

Q. Mr. Vroman, have you made a study of this order with the view of determining how many conductors would have to be employed by the company to comply with this order, if compliance was had by putting on the conductors, [fol. 136] rather than taking off the cars?

A. I have.

Q. how many would it require?

A. It would take seventeen and one-third conductors.

Q. In addition to what you have employed now?

A. Yes, sir.

Q. Let's see. What—we have referred to this Brownsville line, line No. 3723. What would you have to do to

comply with the order in respect of that line?

A. It would be necessary to place a conductor either at Harlingen or Brownsville, and operate them locally between those points, a distance of 25 miles, night and morning. That would involve the expense of one and one-sixth conductors. It is really a one conductor operation, but under our agreement, we are obliged to give them relief at least four times a month.

Mr. Lewis: If the Court please, we move to strike the witness's testimony relative to the agreement, and the testimony based on that, because we don't think that we would be bound by the contracts that they may have with those parties.

Judge Sibley: The Commission says you are entitled to the benefit of it. Don't you have to take the burden?

Mr. Graves: If you will pardon me just a moment, I think you misunderstood him.

Q. You were talking about agreements with conductors?

A. Yes, sir, with the conductors.

Mr. Lewis: He is talking about agreements between the [fol. 137] Pullman Company and the conductors with reference to—

Judge Sibley: Don't we all know they are organized, and you can't travel except according to those agreements? The policy of the Federal Government right now is to make everybody make agreements of the sort.

Mr. Lewis: That may all be true, Your Honor, but we don't think that would prohibit their employing men in

the capacity of conductors to operate those lines, perhaps, outside of those agreements.

Judge Sibley: I think as a practical matter, they would be entitled to prove the situation and the facts.

# By Judge Graves:

### Q. I will ask you to state whether it is-

Judge Sibley: Is that one that is now just dropped off with a porter, dropped off from another train?

A. Yes, sir. There is a pretty good picture of it, Your Honor, on that map there. The conductor operates to Mission, and drops the car off at Harlingen.

### By Judge Graves:

# Q. Are the agreements with the

Judge Sibley: The conductor in charge of the car, in charge of one of the operated cars, goes as far as your junction there?

A. Yes, sir.

Judge Sibley: And that other car was left off with a porter to go 25 miles?

A. Yes, sir.

# By Judge Graves:

Q. The other car goes to Mission. How far is that?

A. About 35 or 40 miles. I am not sure about that, 35 or [fol. 138] 40 miles from the junction point.

Q. The agreements with the conductors—have the agreements with the conductors been made pursuant to the National Railway Labor Act?

A. Yes, sir.

Q. It would be pretty hard for you to get out from under that, wouldn't it?

A. I believe it would.

Q. What would be required in respect to the first line that is mentioned in Exhibit G, line No. 3128?

A. That is much similar to the Brownsville line. The Fort Worth and Houston operation, designated as line 3128, operates with a porter in charge to Ennis, where it is picked up with a conductor who operates between Dallas and Houston, and that is similar to the other line. We would

be required to operate a conductor locally between Fort

Worth and Ennis.

Q. These maps that we have handed to Your Honors have been arranged in the order in which the lines are shown on Exhibit G, and the one I am now inquiring about—

Judge Allred: That doesn't show what road that is.

A. That is the Southern Pacific.

Judge Sibley: How far is that from Fort Worth to Ennis?

A. I think it is 56 miles, if I am not mistaken.

Judge Sibley: Is that a dropped off car?

A. It is dropped off north-bound, and picked up, of course, by the Dallas conductor south-bound.

[fol. 139] Judge Sibley: The round trip runs on beyond Ennis?

A. Yes, sir.

Judge Allred: On up to Dallas north of Ennis?

A. Yes, sir.

## By Judge Graves:

Q. As I understand, there is a through line from Dallas to Houston on the S. P., and on that train leaving at night, the overnight run from Fort Worth to Houston on the S. P., and S. P. runs a branch from Fort Worth that connects with that train at Ennis, 56 miles down the line?

A. That is absolutely correct.

Q. And you run the Pullman car for that 56 miles from Fort Worth to Englis in charge of a conductor?

A. In charge of a porter.

Q. I beg your pardon. And there the car is hooked onto the main line on which there is a Pullman conductor?

A. That is correct.

Q. And running in the opposite direction, the same process operates?

A. That is correct.

Q. The schedule of that train at the present time is shown in Exhibit G, is it not?

A. That is correct.

Q. Leaves Fort Worth at 10:35 P. M. and arrives at Ennis at 12:15 A. M.?

A. That is right.

Q. Do you happen to know whether one of these intervenors operates on that line regularly?

A. Yes, sir.

[fol. 140] Q. That man Allen Harvey?

A. Yes, sir.

Q. How long has he been with the company?

A. I think about 21 years, if I am not mistaken. It might be longer than that.

Q. Stand up, Allen. Is that him?

A. That is he.

Q. All right. Mr. Vroman, you would have to have an additional conductor, you say, to operate on that train between Fort Worth and Ennis?

A. That is right.

Q. And between Ennis and Fort Worth?

A. That is right.

Q. Now, this next line is a Santa Fe line, Atchison, Topeka and Santa Fe, operates from El Paso to Albuquerque?

A. That is right.

Q. Line 3015, and according to this exhibit, it reaches El Paso at 10:15 P. M. and arrives at LaTuna at 10:50 P. M.?

A. Yes, sir.

Judge Sibley: What is the number of that line? Mr. Graves: 3015.

A. It should be the second one.

Judge Allred: It is the next to the last one in mine.
Mr. Graves: It is the line from El Paso to Albuquerque.
Judge Sibley: I have got it.

By Mr. Graves:

Q. The train operates between El Paso and Albuquerque? [fol. 141] A. Yes, sir.

Q. And the porter operates all the way from El Paso to Albuquerque?

A. Yes, sir.

Q. And the distance in the State of Texas covered by that operation is what?

A. 18 miles.

Q. From El Paso to LaTuna?

A. Yes, sir.

- Q. Leaves El Paso at 10:15 P. M. and arrives at La Tuna, the border line of Texas and New Mexico, at 10:15 P.M.?
  - A. Yes, sir.

Q. And returning, it evidently leaves Albuquerque at night and arrives at LaTuna at 6:50 P. M. and El Paso at 7:30 P. M.?

A. Yes, sir.

Q. In complying with the order, what would you have

to do with respect to that line?

A. We would have to operate a conductor locally out of El Paso. He would make the round trip each night, up in the evening and back in the morning.

Q. Mr. Vroman, do you know what the average number

of passengers is on these trains?

Judge Sibley: Which ones, now? .

Mr. Graves: I want to find out if, he is prepared to answer that question as to all of them.

A. I know what the average number of passengers are

on a good many of them. I don't know all of them.

Q. Do you happen to know about the average number of passengers on that Fort Worth to Ennis car and also on the El Paso to LaTuna?

[fol. 142] A. I don't know about El Paso and LaTuna, but the Fort Worth and Houston is a pretty light line. I think they average about four or five beds a night.

Q. If the Court will indicate which one of the maps is

next in order, I will take up that line.

Judge Sibley: From Marshall to Little Rock. Judge Allred: 3531.

### By Judge Graves:

- Q. The line known as Pullman line 3531 operates from Fort Worth to Memphis; the train operates from Fort Worth to Memphis. The porter is in charge going north on that line between Marshall and Texarkana, a distance of 67 miles?
- A. Yes, sir.
- Q. The train leaves Fort Worth at night and arrives at Marshall at 2:20 A. M., and at Texarkana at 4:10 A. M.?

A. That is right.

Q. As a matter of fact, the porter goes on in charge of that car to Little Rock?

A. Yes, sir.

Q. But the portion of it in the State of Texas is this 67 miles. That is a one-way operation. The line is in charge

of a conductor returning from Memphis, as I understand it?

A. That is correct.

Q. What would you have to do in regard to that line to

comply with this order?

A. We would have to station a conductor and probably operate him out of Fort Worth down as far as Marshall, to come back on that line.

Q. How many additional conductors would you have to

employ?

[fol. 143] A. One conductor. It would be one and a fourth. We would have to give him relief, the same as any other lines.

Q. What do you mean by relief?

A. That is by using an extra conductor every fourth day. Conductors on a night run must be relieved every fifth day. In other words—every fifth day, it is necessary to furnish an extra man to make these what we call relief trips.

Q. All of these lines appear to be round trip lines, with the exception of two of the Texas & Pacific lines. That is, that 3531 that you have just described, and the other T. &

P. line, 3501?

A. That is right.

Q. And they operate in charge of a porter only one way?

A. That is right.

Q. If the Court will indicate the next map, I will inquire about that, and save the Court the trouble of going through those maps.

Judge Sibley: 3106.

A. 3106 is the—the porter is shown in charge—he is really in charge from Amarillo to Denver. We merely show the Texas operation, 7:55 A. M. to 11:03 A. M. northbound, and 7:00 P. M. to 11:45 P. M. south-bound. That also is a one car operation, and during the winter season it travels pretty light, and for a number of years we have operated a porter in charge of it during the daylight operation.

Judge Sibley: We customarily take a little recess between the morning and noon session. We will take one now for five minutes.

[fol. 144] (Thereupon, court w s recessed at 19:45 A. M. until 11:05 A. M.)

Judge Sibley: Go ahead, sir.

# By Mr. Graves:

- Q. The question, Mr. Vroman, that we had up was in relation to line 3016 or 3106. 3106, wasn't it?
  - A. Yes, sir.
  - Q. From Dallas to Denver?
  - A. That is right.
  - Q. That is where the train goes?
  - A. That is right.
- Q. And the porter in charge, part of the operation is from Amarillo to Denver?
  - A. Yes, sir.
  - Q. Both ways?
  - A. That is right.
- Q. The porter in charge of operation in there is from Amarillo to Texline, a distance of 117 miles?
  - A. That is correct.
- Q. And the schedule at present is leaving Amarillo at 7:55 A.M., arriving at Texline at 11:03 A. M.?
  - A. Yes, sir.
- Q. And returning, arrive at Texline—leave Texline at 7:00 P. M. and arrive at Amarillo 9:45 P. M.?
  - A. Yes, sir.
  - Q. A distance of-

Judge Sibley: You said that was a one car run?

A. Yes, sir.

#### By Mr. Graves:

- Q. Are all of these lines that we have inquired about so far one car lines?
  - A. Yes, sir.
  - Q. One Pullman car?
- [fol. 145] A. Yes, sir, all of the porter in charge operations in Texas are one car lines.

Judge Sibley: What becomes of the train at Amarillo?

A. That train continues through to Denver. We simply show the operation in Texas. It is a through run from Dallas to Denver.

Judge Sibley: Just one car all the way?

A. Yes, sir, one car north of Amarillo. We have another car as far as Amarillo, and we operate a conductor that far,

but when we drop one car, we discontinue the conductor operation.

By Judge Graves:

Q. You have what you call a set-out at Amarillo?

A. Yes, sir.

Q. And the conductor there stops on that set-out car at

A. That is right. It isn't what we generally consider a set-out car. What we generally term a set-out car is a car that arrives early in the morning, and the passengers sleep there. It isn't what we call a set-out car that provides for occupancy.

· Q. That is a seasonal operation, your porter in charge

operation?

A. Yes, sir.

Q. And at the time this matter was heard before the Railcoad Commission last August, that car was being operated in charge of a conductor?

A. Yes, sir.

Q. And ordinarily, there was more than one car on the train?

[fol. 146] Q. Yes, sir, we have extra lines during the summer, and the conductor operation north of Amarillo was discontinued when the summer lines were discontinued.

Q. When the summer tourist traffic from Texas to Colorado is heavy in the summer months you carry extra cars

and a conductor?

A. Yes, sir.

Q. And when it is light, you have a porter in charge of the operation?

A. That operation has been in effect, I think, that way,

for ten years.

Q. The next line on the map is line 3748 from Dallas to Corpus Christi. It is the fourth line shown on Exhibit G, over the San Antonio, Uyalde, and Gulf Railroad, a part of the Missouri Pacific system, and that seems to be a day operation, both ways.

A. That is right.

Q. A distance of 150 miles between San Antonio, and Corpus Christi?

A. That is right.

Q. Do you happen to know whether that is a light or a heavy traffic line?

A. That is a very light line south of San Antonio. It has considerable business between Fort Worth and San Antonio, but from San Antonio to Corpus it is very light.

Q. Do you know what the average number of passengers

hauled in that car per day is?

- A. A recent check showed that—I have got the figures here for a thirty day period, and it shows an average of two passengers south-bound and three passengers north-bound.
- Q. What would a conductor have to do if you put him on [fol. 147] that train?
- A. Well, I really don't see that there would be much for him to do.
- Q. The next one is line 3010, and it appears in two places on Exhibit G, for the reason that it operates in charge of a porter at two different points. That train, as I understand it, is a train between New Orleans, Louisiana, and Oakland, California?
- A. That is the points that the car operates, and it operates on a number of trains. It isn't a through train.
- Q. Well, as far as the car is concerned, it is a through car?

A. Yes, sir.

Q. It starts at New Orleans and ends up at Oakland?

A. Yes, sir.

Q. And returning, it starts at Oakland and ends up at New Orleans?

A. Yes, sir.

Q. Let's take the Missouri Pacific part of it, and the train comes out of New Orleans and arrives at the Sabine River, the border line in Texas, at 4:20 P. M., and arrives at Houston at 7:25 P. M.?

A. Yes, sir.

Q. A distance of 117 miles?

A. That is right.

Q. And on the return trip, it leaves Houston at 8:20 A. M. and arrives at the Sabine River at 11:20 A. M. While we [fol. 148] are considering that line, at the bottom of Exhibit G, the next to the last line on this supplement that was added to Exhibit G, appears another portion of it covering that part of the line that is operated over the line of the Panhandle and Santa Fe Railway Company, reaches Sweetwater at 10:20 A. M. and arrives at Texico at 3:40

P. M., and returning it leaves Texico at 1:53 P. M. and arrives at Sweetwater at 7:00 P. M.?

A. Yes, sir.

Q. That appears to be a daylight operation?

A. Yes, sir.

Q. That train carries mostly local traffic, I take it?

A. Yes, sir, it does.

Q. In other words, from New Orleans to Oakland, California, it doesn't carry any through passengers, to speak of?

A. No, that is right.

Q. It carries a Pullman conductor in the State of Texas between Houston and Sweetwater?

A. That is correct. We have another car on the train

as far as Sweetwater.

Q. And it is a one car operation for the other portion of the run?

A. Yes, sir.

Q. Where there is no conductor?

A. Yes, sir.

Q. The next line is 3175 from Shreveport, Louisiana, to Kansas City, Missouri. That is over what railroad?

A. Kansas City Southern.

[fol. 149] Q. It appears on Exhibit G the third line from the bottom on the second page, page 85; that line appears to operate in charge of a Pullman porter all the way from Shreveport to Kansas City.

A. That is correct.

Q. Is that a light run?

A. Yes, sir, it is.

Q. A one car run!

A. Yes, sir, the entire distance.

Q. And it cuts across a corner of the State of Texas between the little town of Bloomburg and Red River?

A. Yes, sir.

Q. A distance of 31 miles?

A. That is correct.

Q. What would you have to do to comply with that order in regard to that line?

A. We would have to station a conductor up there and

cover that short territory.

Q. I should have asked you what would you have to do to comply with the order in respect to line 3010, which is from New Orleans to Houston.

A. Well, that would take a conductor at each end, a conductor to operate between New Orleans and the Sabine River, and it would be necessary to extend a conductor's operation that now terminates at Sweetwater. That would take an additional man at that end of the run, too.

Q. Now, line 3309, which appears at the sixth line on the first page of Exhibit G, is an International Great Northern Railroad Company line. The train operates between Gal-

[fol. 150] veston and St. Louis. Is that correct?

A. Yes, sir.

Q. Over what part do you operate the car in charge of a porter?

A. Between Galveston and Houston in both directions, a

distance of 50 miles.

Q. Do you know whether that is a light of a heavy line?

A. It is a very light line between Houston and Galveston. It does a pretty considerable business north of Houston.

Q. Leaves Galveston 10:30 A. M. and arrives Houston 11:59 A. M.?

A. Yes, sir.

Q. On return it leaves Houston 1:10 P. M. and arrives Galveston 2:40 P. M.?

A. Yes, sir.

Q. What would you have to do to comply with the order on that line?

A. On that run we would extend the present conductor's operation, which is between Houston and Palestine, through to Galveston, and cut his lay-over in Houston on the return trip. It would take a half man to cover that portion of the trip.

Q. Now, this is line 3265 between San Antonio and Kansas City. That is the first line described at the top of page 85 of Exhibit G, Missouri Kansas Texas train, and that is a daylight run between San Antonio and Fort Worth?

A. Yes, sir.

Q. That train carries a porter, doesn't it, only in charge of the car between San Antonio and Fort Worth north-bound?

A. Yes, sir.

Q. And a porter in charge between Waco and San Antonia southbound?

[fol. 151] A. Yes, sir.

Q. From 1:30/P.M. to 9:45 P.M. on the north-bound trip and from 3:35 P.M. to 9:00 P.M. on the south-bound trip?

A. Yes, sir.

Q. Is that a relatively light run, as compared with these other runs, or a relatively heavy run?

A. It does more business than these other lines. This is probably one of the heavier in charge lines in Texas.

Q. A conductor, then, accompanies that train north from Fort Worth to Kansas City, a Pullman conductor?

A. Yes. sir.

- Q. And a Pullman conductor accompanies the train south from Kansas City to Waco?
  - A. Yes, sir.

Q. What would you have to do to comply with the order

in respect to that line?

A We would probably operate the conductor through to San Antonio, extend the conductor's operation from Kansas City to San Antonio, which would cover that territory from Waco to San Antonio and return, and operate a man locally out of Fort Worth to cover the territory running north. That would be two conductors.

Q. Two added conductors?

A. Yes, sir.

Q. The next one is 3723, and we have already covered that in your testimony, haven't we? That is the Brownsville train?

A. Yes, sir.

[fol. 152] Q. The next one appearing in the maps is line 3258. That is the third line on the second page of Exhibit G?

A. I would like to explain in connection with that that this line since these proceedings have started has been shortened to Fort Worth. It is not now operated between Fort Worth and Wichita Falls, it operates between Houston and Fort Worth rather than Houston, Wichita Falls.

Q. You mean the Pullman car operates there?

A. Yes, sir.

Q. Since this hearing was held before the Railroad Commission in August the Pullman car has been withdrawn from the train between Fort Worth and Wichita Falls?

A. That is correct. I think January 9th was the date,

if I am not mistaken,

Judge Allred: Is there one still operating to Dallas?

A. Yes, it operates to Fort Worth, between Fort Worth—
or between Houston and Fort Worth.

Judge Allred: I am talking about between Wichita Falls and Dallas.

A. No, sir, I don't think so.

Q. So that isn't presently involved, although it was involved at the time of the hearing before the Commission?

A. That is right.

Q. The next one is 3424. It is about the center of the page on page 85, a Frisco train operating between, train operating between Galveston and Tulsa, a porter running in charge between Denison and Tulsa?

A. That is right.

[fol. 153] Q. And part of the porter in charge run is in the state of Texas, between Denison and Platter, a distance of eleven miles?

A. That is right.

Q. And returning the same way. It seems to be a daylight operation for the part of it in Texas?

A. Yes, sir.

Q. But it is an overnight run in charge of a porter?

A. That is right.

Q. What would you have to do in respect to that line?

A. On that run we would extend the conductor's operation to Platter. The present conductor terminates—the operation terminates at Denison, and we would merely extend that operation to Platter.

Judge Sibley: That conductor doesn't go on with the train?

A. No, sir, he does not.

Q. Well, the conductor that runs as far as Denison goes on with the MK-T train north, doesn't he?

A. No, sir, he does not.

Q. The train splits up there?

A. That is right, it splits up there and that is merely to protect that Fort Worth section of the run. The conductor that handles—well, I won't say that, but the conductors, most of the conductors on the Katy operate via Dallas, and the run on the Fert Worth branch is protected largely by the local men. This happens to be a San Antonio man that runs as far as Denison.

Q. Now, the next appearing is 3273, the next appearing [fol. 154] on the maps, another MK-T run, train operating between San Antonio and Kansas City, and the Pullman

car in charge of porter between Denison and Kansas City?

A. Yes, sir.

- Q. The portion of the porter in charge operation in Texas seems to be a distance of about seven miles?
  - A. That is right.

Q. Each way?

A. That is right.

Q. That is the fourth one of the Katy lines mentioned on page 85.

Judge Sibley: Does that conductor stop at Denison or go somewhere else?

A. Yes, sir, he stops at Denison.

Q. Now, apparently the porter operates in charge of that car from Denison to Kansas City and then back from Kansas City to Denison?

A. That is right.

Q. So he doesn't see a Pullman conductor over that distance of 806 miles?

A. Well, I don't think it is 806 miles, is it?

Judge Sibley: To and from.

Q. Then your map is wrong if it isn't.

A. I haven't got a map here. I didn't think the distance was quite that great.

Q. But if he does-

A. Yes, sir, he operates to Kansas City, whatever the distance is,

Q. Seven miles of it in Texas?

[fol. 155] A. That is right.

Q. Did you say what you would have to do about that line?

A. We would have to put a conductor up there to protect that short distance.

Judge Sibley: Couldn't you make him live at Red River?
Why couldn't you do that?

A. I can't answer that, Judge.

Q. Well, the point that I wanted to inquire about is whether you would have to put another conductor on to serve that line?

A. Frankly I can't answer that definitely from memory. I have some records on it, but I can't answer just what the arrangement was to protect that.

Q. You don't know whether you have counted an extra conductor among your list?

A. I have the records in my file.

Mr. Graves: Unless the court wants to know about it I won't stop to ask him to look it up now.

Q. You might supply that later.

A. Yes, sir.

Q. The next one we have here, Mr. Vroman, is line 3501, a line that operates, the train operates from St. Louis to El Paso and El Paso to St. Louis over the T & P, and apparently it operates in one direction in charge of a porter, between Texarkana and Marshall, leaving Texarkana at 3:00 p. m. and arriving at Marshall at 4:25, a distance of 67 miles?

A. Yes, sir.

Q. What would you have to do to supply that? [fol. 156] A. That and the next one, 3501 and 3531, are both one way operations. We would operate a conductor out of Little Rock down to Marshall to handle 3501 south-bound and return him in 3531. That would be a man and a half operation for the two lines.

Q. The next one is line 3076, between Amarillo and Oklahoma City, known as the Rock Island, down at the bottom

of the first page of Exhibit G?

A. Yes, sir.

Q. And that operates with a porter in charge for the entire distance of the train?

A. From Oklahoma City to Amarillo, a night run.

Q. It is an overnight train?

A. Yes sir.

Q: Both ways?

A. Yes, sir.

Q. The distance in Texas is 112 miles?

A. That is correct.

Q. What would you have to do to supply that operation?

A. We would operate a conductor locally out of Amarillo over to a meeting point, which would probably be some point beyond Texola, and back on the return trip, leaving there at 4:23 in the morning.

Q. The next one is line 3251 between St. Louis and Waco, Fort Worth, St. Louis and Waco, on the MK-T. It is the second line shown on the top of page 85 in Exhibit G.

A. Yes, sir.

[fol. 157] Q. Operates with a porter in charge between Fort Worth and Denison going north and between Denison and Waco south, is that right?

A. That is right.

Q. A distance of 96 miles northbound and 186 miles south-

A. Yes, sir.

- Q. What would the compliance with the order occasion in respect to that line as to conductors?
- A. That is another one I am not clear on from memory. If you would like to have me look at my records. I ought to have them here, but I didn't bring them with me. I have them in my portfolio there. I think that southbound, that is covered by the conductor who would—no, I guess it isn't. With your permission I would like to look up and see what the condition is, if it is important.

Q. Just do that later. We won't stop to do that now.

A. Yes, sir.

Q. Next is line 3015, from El Paso to Albuquerque, and you have already testified about that?

A. Yes, sir.

Q. The next is 3370, a line operating between Dallas and Memphis over the Cotton Belt?

A. Yes, sir.

Q. And it appears-

A. That is a through porter in charge operation between Dallas and Memphis, and we would have to operate conductors locally out of Dallas to Texarkana and back.

[fol. 158] Q. Now, that operates without a conductor and in charge of a Pullman porter between Texarkana and Dallas going south and Dallas and Texarkana going north?

A. Without a conductor the entire distance...

Q. That is the part of it in Texas where you have no conductor?

A. Yes, sir, that is right.

Q. So that car travels without a conductor for a distance of 193 miles in Texas, plus the distance of Texarkana to Memphis, which is according to this map 289 miles?

A. That is correct.

Q. Do you recall what you would have to do to comply with the order in respect to that line?

A. I think the figures show we would have to operate a conductor and a half on that.

Q. The next line is line 3128 between Fort Worth and Houston, and you have already testified about that?

A. Yes, sir.

Q. I believe that covers all of these lines, doesn't it, Mr. Vroman?

A. I think it does, yes, sir.

Q. All of the lines that are being operated in the State of Texas in charge of porters are shown in Exhibit G attached to the complaint?

A. Yes, sir.

- Q. And one of those lines shown in that exhibit, 3258, is not now being operated with a porter?

  [fol. 159] A. That is correct.
- Q. In fact, you have discontinued the line between Fort Worth and Wichita Falls?

A. That is correct.

Q. Do you recall whether the railroad company requested the discontinuance of it?

A. It is my understanding they did.

Q. On account of the

A. We received notification that they had discontinued

that part of the line, shortened the operation.

Q. Mr. Vroman, the order that is being challenged in this suit states, among other things, that the Commission has found that where these cars are operated in charge of negro porters, that the women passengers on these lines are in danger of being insulted. Now, that is the allegation. I want to ask you if you have had occasion to examine the records of the porters operating as porters in charge in Texas for a period of say five years back?

A. I did.

Q. What is that record with respect to the action of the porters themselves, as to their treatment of the passengers?

A. We have not had a single case involving a porter in

charge operation in Texas during that period.

Q. When you say you have not had a single case you

mean you have not had any complaints?

A. Any serious complaint in the nature of an assault or mistreatment or discourtesy or anything of that sort. We always have reports of passengers carried by on conductor runs and porter in charge runs; occasionally, I say we get [fol. 160] some of them, but I say nothing that would reflect against the actions of a porter toward a woman passenger.

Q. All right, the order also contains a finding to the effect

that women passengers, as well as the other passengers, are in danger of being insulted and in danger of bodily harm from other passengers on the train, particularly those who may be under the influence of liquor. Have you examined the records to determine whether anything like that has occurred on these porter in charge lines in Texas?

A. There has been nothing on porter in charge lines. The records showed we did have five such cases on trains where we operated conductors. It just so happened that way. We have had no reports of that sort on porter in charge

lines.

Q. These other cases you speak of, is that during the past five years?

A. Yes, sir.

Q. It covers the same period?

A. That is right.

Q. I will ask you to state whether the rules of the railroad company require the railroad train men, that is, the conductors and brakemen, to report incidents of that kind or any other incidents affecting passengers?

Mr. Culbertson: Now, if the Court please, we object to that as being hearsay evidence. The rules of the railroad would be the best evidence.

[fcl. 161] Judge Sibley: I think you are perfectly right about it.

Mr. Culbertson: They are published rules, and we would like to have them in evidence.

Q. What would be the added expense to the Pullman Company involved in employing the additional conductors that would be required to supply these lines, if you had to comply with the challenged order?

A. \$41,000.00; \$41,600.00.

Judge Sibley: What length of time does that cover?

A. I beg pardon?

Judge Sibley: What length of time is that?

- A. For a year.
- Q. Per annum?

A. Yes, sir.

Q. That would be the additional Pullman conductors' salaries the company would have to pay out?

A. Yes, sir, on the basis—we use a flat average of \$2400.00 a year. Their rates, they are on a scaled basis depending on their length of service, and \$200.00 a month we figure is a fair average.

Q. All right, that would be the expense of that kind. Would you save any expense by reducing the porters'

salaries?

A. Yes, we would save approximately \$5,000.00.

Q. In other words, of the \$41,000.00 that you would pay the conductors you would have to take \$5,000.00 of it away from the porters?

[fol. 162] A. That is right.

Q. Now, do you know whether any of that would ulti-

mately be passed on to the railroads?

A. That is an accounting matter, but I understood it would, some portion of it. I am not prepared to say to what extent it would.

Q. Mr. Bradish is here?

A. Yes, sir.

Q. And he can give us the figures on that?

A. Yes, sir.

### Cross-examination.

### Questions by Mr. Morgan:

Q. Mr. Vroman, you say it costs \$2400.00. Is that the average for each conductor?

A. Approximately, yes, sir.

Q. What is the maximum for each conductor?

A. \$205.00.

Q. What is the minimum?

A. \$172.00.

Q. How do you arrive at the figure of \$200.00 as being the average?

A. Well, we have employed no conductors for ten years, and they are all of them in the higher wage brackets.

Q. You haven't hired any new conductors?

A. I say not any. I know we took up one man at Cincinnati, but we haven't employed very many, two or three at some places.

[fol. 163] Q. Has that been occasioned by a program of taking off conductors and substituting porters in charge?

A. No, sir.

Q. Now, then, Mr. Vroman, the rank and position of a Pullman porter as provided in the order; you are of a rank and are an assistant to the vice-president and you are superior to the conductors, aren't you?

A. Well, I guess you would term it that way.

Q. All of these gentlemen that Mr. Carry testified about being over the conductors, they have a rank and position at least equal to the conductor, do they not?

A. Yes, sir.

- Q. All right. Now, then, I will ask you if it has not been a custom in Texas and in your system all over that when it was necessary for you to comply with a rule or regulation such as this that you proceeded to pool the runs of the various conductors?
  - A. No, that is not right.
  - Q. That isn't right?

A. No, sir.

Q. You have a man employed, each conductor, for 240 hours per month?

A. That is the basic month's work.

Q. You have a right to call on his time for that much, do you not?

A. That is right.

- Q. That means eight hours a day for thirty days a month? [fol. 164] A. That is correct.
- Q. Less the time he lays off, which is included. That means you can use his time, then, 240 hours per month?

A. That is right.

Q. And you can use that at such place or such advantage as you deem best, can't you?

A. No, I wouldn't say so.

· Q. Why can't you use that, Mr. Vroman?

- A. Well, a man that is in a regular assignment, we make up a schedule showing what his operations would be. Now, if we use him beyond that we would expect to have to pay him for that.
- Q. You mean if you worked a man 180 hours on a regular assignment per month and then you used him on some short run you would have to pay him for that short run?

A. Extra, yes, sir.

- Q. You mean you can't pool his run with some other run and use the entire 240 hours?
- A. No, I don't mean that. We can pool certain classes of runs. We don't pool night runs, but like this run from

Palestine down to Houston and then on to Galveston, we could extend that operation down to Galveston or pool it up, but we couldn't pool night runs with any other runs.

Q. Well, that is the one exception that is provided in the contract between the Pullman Company and the Pullman

conductors, isn't it?

A. That is right.

[fol. 165] Q. Other than that one exception you can pool them, can't you?

A. Yes, we can pool certain types of runs, but there are

few, very few pools throughout the whole country.

Q. Isn't that a matter of working out the schedule of each conductor? By pooling you simply mean you work out his schedule?

A. That is right.

Q. Let us say a man that may run from Fort Worth to Kansas City and back, let us say he uses 200 hours a month doing that. If you desired to you could work out his schedule where he could make a schedule down to Ennis and back if it worked out properly with his other run?

A. No, sir.

Q. Why not?

A. Under our agreement we can't pool long and short runs to build up the hours to get the maximum hours of 240.

Q. Let's say if a man runs from Fort Worth to Abilene and back and he uses on that run 200 hours per month, could you use his run from Fort Worth to Ennis and back, could you use him on that run?

A. No, sir.

Q. Why?

A. Under the agreement that is a one night run up to Amarillo. We can't pool that up with anything.

Q. What can you pool then, Mr. Vroman?

A. Well, like this day run down to Corpus Christi, if we had another run from San Antonio up to—a day run over [fol. 166] to Houston, for instance, we are not restricted on pooling when it comes to daylight operations.

Q. All right, how about one on down to Brownsville?

A. It wouldn't run to Brownsville. The Brownsville is a night run from Harlingen on down. How would you get the conductor down there? You can't pool runs unless they come together.

Q. Assuming they come together. Some in San Antonic come together?

come to ether

A. Yes, sir.

Q. And you could pool those runs?

A. Yes, sir.

Mr. Graves: I beg your pardon, that train doesn't run through San Antonio.

Mr. Morgan: I didn't have any particular train in mind.

A. That is strictly theoretical. But if he did, if they did

come together, you could pool them.

Q. In Houston you have a number of trains that are affected by this order that do go through Houston, don't you?

A. Not very many.

Q. The one from Galveston up to Houston!

A. Yes.

Q. Houston across the Sabine River?

A. Yes, sir.

Q. One from Houston across to Denison?

A. Yes, sir.

Q. Now, would it be possible to pool any of those runs of the various conductors?

[fol. 167] A. What would be the advantage of pooling them; if you run a conductor over to the Sabine River and back you have another operation down to Galveston that involves the same hourage. You couldn't pool them to advantage.

Q. Heretofore you have done that, haven't you, Mr. Vroman?

A. Not unless there was some advantage.

. Q. I understand, but where there was advantage?

A. Yes, sir, we have pooled some day runs.

Q. Isn't it true some of your conductors don't run over 180 or 200 hours per month?

A. Yes, sir.

Q. Therefore, if you should decide to try to work out a schedule you have a call on their time without additional compensation for the 240 hours per month?

A. No, I don't think so. I will say definitely that we do not. There is nothing to be gained by pooling two one night runs. It only mixes up an operation for no purpose.

Q. All right. Now, in Texarkana alone there are three lines that go through there. Would it be possible to pool any of those together? Have you studied that, Mr. Vroman?

A. I studied those two. We have two one way lines.

Q. Would it be possible to pool those?

A. I think so. I think you could pool those two.

Q. All right, if you pool those two it wouldn't require an

additional conductor, would it?

A. I pooled these two together and used a conductor and a half for the two runs. They are both of them one way. It simply makes a round trip operation.

[fol. 168] Q. Now, then, when you are talking about these various different lines about which your counsel has gone over in detail, you are taking into consideration the cost as to that particular operation, aren't you?

A. That is right.

Q. And that is all you are taking into consideration, isn't

A. That is right.

Q. Now, I believe you said you studied this order and its effect. There is a provision in this order: "It is further ordered by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force." Now, then, have you made application to the Commission as to the operations on any of these particular lines for relief as to that particular part of it?

A. Well, I think our legal people would have to answer

that. I don't handle matters of that sort.

Q. I just asked you if you know, Mr. Vroman?

A. No, I don't know.

Q. All right. Now, when did you take off on this Brownsville run, or did you ever have a conductor in charge there, sir?

A. I don't think we ever did.

Q. You don't think you ever did?

A. No.

[fol. 169] Q. Has that always been a porter in charge run?

A. I think so.

Q. A porter in charge run?

A. I wouldn't say definitely about that, Mr. Morgan, but I know it has been a porter in charge for many, many years.

Q. Down at Brownsville you have three railroads, don't you?

A. I think the S. P. and the Gulf Coast line are the

only ones that I know that run in there.

Q. How about Harlingen, aren't there two or three rail-.roads in there?

A. Just the same there, I think.

- Q. How about this run to Ennis, when did you take the conductor off that run?
- . A. The same operation has been in effect for twelve or fifteen years at least."

Q. Porter in charge, you mean?

A. Yes, sir.

Q. How about the El Paso across to Albuquerque?

A. That was recent, early in 1939.

Q. How did you handle that before. Mr. Vroman?

A. We had a conductor.

- Q. Where did he run from?
- A. El Paso to Albuquerque.

Q. And return?

A. Yes, sir.

- Q. And on account of the expense you took him off, is that correct?
- A. Well, it was felt—it is a one car operation. It used [fol. 170] to have about three cars on there, but it has been deteriorating year after year and it got down to a one car operation, and we felt it wasn't needed.

Q. Now, El Paso has three railroads, doesn't it?

A. Yes, I believe so.

Q. Isn't that a terminal point of railroads there?

A. No, I don't think so.

Q. Isn't that the place where your Pullman conductors live? They operate out of there?

A. I think we have five conductors there.

Q. Have you thought of the possibility of (rearranging their schedules so you could use one of those conductors on this particular run?

A. We don't think he is needed. They formerly had it.

That is the reason we took him off.

Q. I understand. Now, then, the one from Amarillo to Denver, when did you take that run off?

A. What was the question, Mr. Morgan?

Q. The one from Amarillo down to Denver-from Denver down to Amarillo.

A. I can't remember the exact date. It was early in September, though, after the summer lines came off.

Q. All right. That is, in the winter time, then, you don't

have a conductor?

A: That is right.

Q. Well, you govern that, then, by the number of passengers you have, is that the way you do it?

A. The requirements of the service.

[fol. 171] Q. Now, from Dallas to Corpus Christi, you say you don't have a conductor on that run?

A. No conductor between San Antonio and Corpus. We .

have one to San Antonio.

Q. How long ago did you take him off?

A. That has been a porter in charge run for many years,

Q. How about the one from New Orleans to Oakland, California? When did you take that off?

A. Early in 1939.

Q. That is the second one, I believe, you testified about you have taken off in 1939?

A. That is right.

Q. What did you do prior to that time on that run?

A. It was a conductor operated run between Houston and New Orleans.

Q. Oh, he operated all the way from New Orleans to Houston?

A. That is right.

Q. I believe you testified awhile ago that you made a thirty day test of some sort regarding this run from Corpus Christi?

A. Yes, sir.

Q. When was that rest made, Mr. Vroman?

A. The figures were for December.

Q. Of this last year?

A. Yes, sir.

Q. All right. Now, then, with reference to this run from Shreveport to Kansas City, when did you make that a

[fol. 172] porter in charge run?

A. It has been a porter in charge run for four or five years. That is like a good many of these others, they used to have a good many cars in the train and finally it dwindled down to one and they have been porter in charge since.

Q. Galveston to Houston, when did that become a porter in charge?

A. That has been a porter in charge for twelve or fifteen

years, too.

Q. The one from Kansas City to San Antonio, when did you make that a porter in charge?

A. This last February.

Q. Within the last year?

A. Ye sir.

Q. That is the Katy that runs out of San Antonio through Austin and Waco and on up this way?

A. Yes, sir.

Q. It runs through this city here?

A. Yes, sir.

Q. And that is a very heavy train, heavy traffic?

A. Some portions I believe quite heavy.

Q. You serve the universities that are located up along the road, the University of Texas, Baylor, and other universities, don't you?

A. I expect we do.

Q. And you say you took that off in 1939?

A. That is right.

[fol. 173] Q. Now, then, where was your conductor prior to that time or where did he run from?

A. He ran from Kansas City to San Antonio.

Q. Now, then, the one from Houston to Fort Worth, formerly the Wichita Falls run, has that been taken off entirely?

Mr. Morgan: Do I understand that, Judge?

Mr. Graves: The porter in charge has.

Q. You have recently changed back to a conductor on

that, have you?

A. It always did have a conductor in charge as far as Fort Worth, and we discontinued the sleeping car service between Fort Worth and Wichita Falls.

Q. All right. On the Frisco, then, from Galveston to Tulsa. When did you take the conductor off that run?

A. That has been a porter in charge operation for many years, too.

Q. Now, this other Katy run from San Antonio to Kansas City, when did you take that off?

A. I can't tell you on that definitely, Mr. Morgan: It has been a porter in charge operation for a long time though.

Q. Well, hasn't it been within the last two or three years?

A. It, might have been three years ago. They have changed that run over there so much that I am not clear as to just when it was made. We now have a car that operates to Waco and dead-heads up to Fort Worth, and I think it is pretty involved operation, and I don't recall the defails of it offhand.

Q. All right, this run from St. Louis to El Paso on the [fol. 174] T. P., when did you take that conductor off?

A. That is much the same thing. The T. P. has changed their service a good bit, but the porter between those points, to my recollection, has been in charge a long time.

Q. Hasn't that been relatively recent? I mean within the

last two or three years?

A. No, sir, I don't think so.

Q. All right, how about the one from Amarillo to Oklahoma City, when did you take that conductor off?

A. Well, I would say approximately two or three years ago.

Q. All right, sir. Now-

A. That is much the same as the others. They had other lines out of Oklahoma City until up to that time.

Q. How about the run on the Katy from Fort Worth to

Waco? That is a recent one, isn't it?

A. Well, that is the one that I spoke of that I said the line stops. That is 3251. That stops at Waco and then runs up to Fort Worth, and I can't tell you offhand how long that has been, but it is not recent. It is not in 1939.

Q. Are you sure of that, Mr. Vroman?

A. I am pretty sure of it, yes, sir.

Q. All right, how about the one from Dallas to Memphis?

A. That was in the early part of 1939 or the latter part of 1938. That is the Cotton Belt, you mean?

Q. Yes, sir.

A. Yes, sir.

[fol. 175] Q. Well, then, in your operations in Texas, out of the seventeen, or now sixteen, operations complained of that you have set forth in your bill of complaint, five or six of them at least are operations that have been changed within the last year, and others within the last two or three years, is that correct?

A. I think there are four this last year, if I am not mistaken.

Q. Well, the tendency is more and more, isn't it, Mr. Vro-

man, to do this in your entire system?

A. No, I wouldn't say so, Mr. Morgan. It all depends on the discontinuance of lines. As I testified this morning, our service is about fifty per cent what it was some years ago, and naturally these cars have to come off some trains, and changed conditions have brought about changes in the conductor operations.

Q. Over your entire system you have done this same

thing, haven't you?

A. Well, it has been more pronounced in some sections than others. Our business in some sections hasn't fallen off as much as it has in others. There is no hard and fast rule. We are simply governed by the make up of the trains and the requirements of the service.

Q. You mentioned awhile ago something about some con-

duct on the train, some five cases, Libelieve you said?

A. Yes.

Q. I didn't understand just what occurred. Was that between passengers?

A. That is right.

[fol. 176] Q. And who made that report?

A. The conductor, I think.

Q. All right, Mr. Vroman, are you suggesting to this court that in the event of misconduct between passengers on the train that a porter is as well qualified to handle that situation as a conductor would be?

A. Absolutely, unqualifiedly.

Q. You think if a man on the train is conducting himself improperly by reason of drink or otherwise that a porter

could handle the situation as well as a conductor?

A. Mr. Morgan, I think he handles it better. A porter has more tact in handling a drunken passenger or a passenger who is misconducting himself than a conductor has. If he pukes all over the floor the porter is going to wait on him and he has more persuasion than the ordinary conductor.

Q. I see. All right. Now, then, I believe under your contracts that you are talking about you get a fixed sum before the railroad participates in the profits, isn't that correct?

A. Naturally, Mr. Morgan, I am not altogether familiar with the contracts. I would cooner you would ask some of

our accounting people about that. I know in a general way, but I don't know all'about it.

Q. You have those gentlemen here in attendance who will testify in this case?

A. Yes, sir.

### Redirect examination.

### Questions by Mr. Graves:

Q. In giving your statement as to the number of conductors that would be required to supply these lines if they were converted into conductor lines, I will ask you whether [fol. 177] you have made a study of the pooling problem as well as all other problems that would be involved?

A. Yes, sir, I have.

Q. And you have attempted to work out an arrangement that would be the most equitable and most satisfactory?

A. Absolutely. I think I explained to you in that run down to Galveston we were able to couple that up with the

present operation and simply add a half man.

Q. Are the Pullman conductors under the same kind of supervision from district supervisors, agents, inspectors and so forth as are the porters?

A. Just the same, the same instructions and same super-

vision.

Q. Now, you stated a moment ago that you hadn't hired any new conductors for something like ten years. 'Have you hired any new porters?

A. Yes, sir, we have hired some porters, probably two

or three hundred maybe.

Q. What is the ratio of porters to conductors, about how many porters are there on the lines as compared with the

number of conductors?

A. Well, we have about 9,000 porters and about 1,700 conductors, and I can't tell you the number required to fill regular lines offhand, the number required to fill regular lines of porters and conductors too.

Q. Do you happen to know whether there have been any

new porters hired in Texas?

A. None whatever.

Q. None whatever? [fol. 178] A. None whatever,

Q. All of the porters that are operating in Texas, whether in charge or on your conductor lines, are old porters?

A. Ten years or better. Most of them are free uniform men.

Judge McMillan: Free what?

A. I say free uniform men. In other words, we furnish

free uniforms after ten years service.

Q. This day run that Mr. Morgan referred to on the Katy as being a very heavy run operates how many Pullman cars between San Antonio and Fort Worth?

A. One.

Q. And then returning between Waco and San Antonio?

A. One both directions. One car both directions between Waco and San Antonio. They pick up another car at Waco. All of these runs are one car operations throughout the entire porter in charge operations.

Mr. Graves: I will say this to the court, if I may be permitted, and to counsel, that I don't care to pursue this matter any further of how many conductors would be required. That is for the simple reason, as we feared, that practically all the advantage we would get out of it would be showing jurisdictional amount and the amount is so large that if we showed two or three hundred per annum we would certainly have a jurisdictional amount.

(Witness excused.)

(The court then, at 12:00 o'clock noon, Saturday, February 17, 1940, recessed until 9:00 o'clock a.m., Monday, February 19, 1940, at which time the following proceedings were had:)

' [fol. 179] Monlay, February 19, 1940

Morning Session, 9:00 A. M.

# PRELIMINARY DISCUSSION

Judge Sibley: Over the week end I have had an opportunity to read the pleadings and various papers in this case, and I find in the order of the Commission there is a provision that whereby in any particular case, and that was the word they used, case, the railroad company desired to pull a car without compliance with the order, that they would come to the Commission and get its special consent. Well, I had the thought that maybe these seventeen runs

ought to go to the Commission as special cases to have their judgment on whether or not they ought to be permitted, being in peculiar circumstances, not to have to comply, but findings five and eight of the order seem to indicate that the Commission had, to some extent at least, considered these seventeen runs, and I notice the pleadings of the Commission do not anywhere suggest that the matter is open and that the railroads and Pullman Company ought to come to them for special consideration of these cases, and the inquiry I want to make is whether or not you all are agreed about that, whether this is a closed chapter as to each of these seventeen runs, or whether it is a matter that is still open and that the Commission would have the power and duty to consider especially.

Mr. Graves: I assume that your Honor wishes to hear from the Commission first in answer to that question?

Judge Sibley: Well, you attack the whole order broadside, you said they didn't have any right to make any [fol. 180] order at all.

Mr. Graves: Yes, sir, that is correct. I think that I may as well say to the court that we considered that feature in the order, naturally, before we filed this complaint, and as we view it that is simply another and additional arbitrary feature in the order. All of these porter in charge lines were considered by the Commission at the hearing, and at the hearing they knew precisely what porter in charge lines there were in the State of Texas. The only two that have been added to the complaint, and that the Commission did not consider, are the two that have been inaugurated since the hearing was had, and attached to the complaint by way of amendment and addendum.

Judge Sibley: I mentioned that for the reason that Federal Courts have a great reluctance toward interfering with state operations until they get right to the last ditch. For instance, even in tax cases they require you to exhaust your administrative remedy before you come into the Federal Court with constitutional questions. There must be a last ditch fight in the state set-up, and whether that has happened or not is what was troubling me.

Mr. Graves: Yes, sir, we gave consideration to that and that is the thing that impelled us, when they first issued this order without notice or hearing, to go to the Commission and ask for a hearing with respect to all of these runs.

Judge Sibley: They were separately presented to the Commission?

Mr. Graves: Yes, sir, every one except the two that have been inaugurated since the hearing.

[fol. 181] Judge Sibley: You say about one or two of these runs, that they don't involve anything but interstate passengers. Was all of that before the Commission?

Mr. Graves: Yes, sir.

Judge McMillan: Did they make any order?

Mr. Graves: No, sir. Exhibit F is a new order they made after the hearing, and it contains the broad, sweeping, prohibitory provision in the exact language of the original order they entered without notice or hearing.

Judge Sibley: And then added this opportunity to come back to the Commission? Is that a single charter car

or something?

Mr. Graves: I don't know, Your Honor. I think I ought to say that in no event has the Commission authority under the Texas Constitution or the Texas statutes to promulgate a general sweeping order that amounts to a legislative order, and then say without announcing any standard that if we see fit to do so we may see fit to grant you relief from some particular operation. We think that is nothing but an additional arbitrary feature attached to the order. Now, if they had promulgated some standard that would enable us to apply the standard to a given run and come to them if that run, as we see it, happens to fall within the standard that would entitle us to an exemption from the order, that would be a different question, but we have had two hearings before the Commission with respect to all of these matters, and we thought it would be idle to have any more.

[fol. 182] Judge Sibley: I will tell you what we did in a case in Florida in which it was uncertain whether the administrative authorities had shot their bolt or hadn't, we retained an injunction for thirty days, I think, in order to give them opportunity to make the application or take the action that would bring the matter to a focus, and we let the bill pend until—I believe in that case it was some Federal decision—they could come to some conclusion as to what they

were going to do, and the bill was left pending as a safe-

Mr. Graves: These are all of the porter in charge operations in the State of Texas, and we would still be here with

this very bill.

Judge Sibley: Well, if they mean business, if they have considered this thing and made their decision there isn't any reason to go over it again. I was just asking if they had done that.

Mr. Graves: Yes, sir, they have considered all of them

except the two runs inaugurated since then.

Judge Sibley: Judge McMillan wants to put it to you pretty pointedly. He wants to ask you straight off the bat that as representatives of the Commission whether the Commission regards these matters as open or whether

they regard them settled?

Mr. Lewis: If the Court please, about the only way we can answer that is in this way, that looking at this order and considering it in the light of the testimony that was given [fol. 183] before the Commission, which we have read, it doesn't seem to me'that the order is necessarily intended to preclude each and every line of operation in the State. of Texas. Now, in inspection of the testimony that was given before the Commission perhaps shows in a general way consideration of each of these lines of the railroads and the Pullman cars. Nevertheless, I think a fair reading of the whole testimony before the Commission simply shows that the question open for consideration there was the general authority of the Commission to enter an order of this kind having a general application, and it seems to me that a savings clause was meant to take care of specific situations where a line which objected to this character of order could go in there and develop the evidence that pertained to that particular line. And the evidence that was before the Commission was somewhat of a general nature which bore on the authority of the Commission to enter that sort of an order. Now, this order, of course the immediate effect of it would apply only to the lines in Texas which are operated without Pullman conductors, but manifestly it would apply to the many, many other lines-

Judge Sibley: It applies to every Pullman car running in Texas? Wouldn't it be just a breach of those running

without conductors?

Mr. Lewis: Yes, sir. And to say that the Commission in the previous hearing had up for consideration the individual lines and each and every individual line in Texas would be going a long ways. I don't see how it could be said, from an inspection of the record, that consideration was given to each and all of these operations. I think each one would have its own facts to sit on.

[fol. 184] Judge Sibley: Now, in finding five they say there are seventeen lines run at present without a conductor, and that the passengers on them pay the same amount and don't get the same service, and they find that there is a discrimination there. That looks like they passed

on it.

Mr. Lewis: Yes, Your Honor, that paragraph does all

right.

Mr. Graves: In connection with the question that the Court has raised, I will ask counsel if he has a copy of the transcript, the official transcript of the record before the Commission? .

Mr. Rotsch: Yes, sir, we have it.

Mr. Graves: We would like to offer in evidence this

transcript, if the Court please.

Judge Sibley: That is a whole lot of evidence. Is there any result coming from that? Of course, we ought to test what they did by what they ordered.

Mr. Graves: That has been our contention, your Honor. Judge Sibley: You all don't agree about it. We are killing time. Go ahead with the evidence.

B. H. VROMAN, was recalled as a witness for plaintiffs, and previously having been duly sworn, testified further as follows:

[fol. 185] Direct examination.

# Questions by Mr. Graves:

Q. Mr. Vroman, directing your attention to the matter that the Commission made a special finding on, its special finding No. 13, appearing on page 65 of the complaint, I will ask you to state what special training a conductor receives from the Puliman Company that is not received by the porters in charge?

A. None that I know of. The porters receive the same instructions that a conductor does when he is required to operate in charge.

Mr. Morgan: If the Court please, may we inquire of counsel if this examination of this witness is limited as it was on Saturday to jurisdictional facts, or is he now going into the case on the merits?

Mr. Graves: We hadn't intended to be limited to jurisdictional questions. We intended to go into the merits.

Judge Allred: Will the reporter read the last question and

Thereupon the Reporter read the question and answer as follows:

"Q. Mr. Vroman, directing your attention to the matter that the Commission made a special finding on, its special finding No. 13, appearing on page 65 of the complaint, I will ask you to state what special training a conductor receives from the Pullman Company that is not received by the porters in charge?

A. None that I know of. The porters receive the same instructions that a conductor does when he is required to

· operate in charge."

[fol. 186] Q. What books of instructions or bulletins are issued to the conductors that are not issued to the porters in charge?

A. None whatever. They receive the same book of instructions, and these quarterly service and safety meetings are held and the same information is passed out to the porters as to the conductors. The same instruction is covered.

Q. What schools does the company have for conductors

that are not also held for porters in charge?

A. None. We hold quarterly service meetings for the benefit of conductors and porters both for the purpose of acquainting them with any new features and for reviewing regulations that have already been issued from time to time.

Q. When a new conductor is employed by the company how long does he attend instructions schools or how long.

does he spend in an apprenticeship capacity?

A. Usually ten days and he is given instructions by someone that is familiar with our requirements in regard to the forms that are used, making up the diagrams and going over the forms in general, and then he is allowed to make a road trip with an experienced conductor and permitted to lift the transportation and get instructions that way from actual contact. The same applies to the porters. They are given the same instructions in regard to diagram work and that sort of thing.

Q. What service is rendered by the Pullman conductor to the Pullman passengers on the train that is different from the service that is rendered by the porter when the

[fol. 187] conductor is not on the train?

A. We feel that the passenger receives the same service on a car in charge of a porter that he receives when a conductor is present provided the porter lifts the transportation, and he looks after the passenger in every respect as the passenger receives on a conductor train.

Q. I was going to bring that out, but that isn't exactly what the question called for. The question I am now asking you is what is it that the porter has to do when he becomes a porter in charge in his contact with the passengers that he has not theretofore been required to do as a porter?

A. Merely lift the passengers' transportation.

Q. What additional service does he render to the company now as distinguished from that that he renders to the passenger?

A. He is required when operating in charge to lift the transportation, prepare the diagram, and, if it is necessary, to send space messages down the line just the same as the conductor would, and write up the diagram.

Q. As a matter of fact, as to all of these porter in charge runs in Texas, does the porter lift the transportation?

A. Not always. At some points where the trains leave late at night the transportation might be lifted by a conductor in the depot who receives for other cars at the same time, but in the daytime where the transportation is not lifted in the depot the porter handles it. I might add that on some trains the train conductor lifts both railroad and [fol. 188] Pullman transportation and turns the transportation over to the porter as the ticket lift is made. There is no hard and fast rule about that. Some train conductors require porters to do it and sometimes they lift it and turn it over to the porter.

Q. You spoke of the service meetings held for the conductors and for the porters. Are those meetings joint or are they separate? That is, do the porters and conductors

attend jointly a common meeting?

A. In most districts they are separate, but in smaller points joint meetings are held. Not invariably, because some of the small points are separate, but a good many of them hold joint meetings.

Q. How many Pullman lines are there in Texas at the

present time?

A. Lines locally in Texas and entering Texas, I think there are 114.

Q. What do you mean by a Pullman line?

A. Well, a Pullman line, it is all of our operations. That is a car movement from one point to another. They are identified by a line number, simply a distinguishing mark. To quote an example, I refer to this Fort Worth-Houston line in which the porter operates in charge from Fort Worth to Ennis. That is known as line 3128. It means a round trip operation of a car from one terminal to another. We have some trains that have several cars bearing the same line number, but usually a line number means one round [fol. 189] trip operation.

Q. Well, take the Texas Special for example on the Katy, or the Sunshine Special on the Missouri-Pacific, each of

which trains carries a number of Pullman cars?

A. Yes, sir.

Q. Does each car have a different line number?

A. No, they don't. On the Sunshine there are two cars and that is line 3301, the line that runs to Mexico City. It is the same type of car, the same destination, and it is given the same line number. In that case we consider that a two car line, but usually each car has a separate line number.

Q. Well, how many Pullman cars are involved in the Texas operations, in these 114 lines how many Pullman cars are you using in service in Texas, in and through Texas?

A. Well, I am not sure as to that. You mean Pullman

lines?

Q. Yes, sir, I mean Pullman lines.

A. 114.

Q. No, I mean how many Pullman cars do you use to operate those lines?

A. 400. That is the number of cars required to fill these

so-called Texas lines.

Q. How many porter in charge lines are in Texas now?

A. Sixteen.

Q. How many cars are in operation in the porter in charge lines in Texas?

A. I think forty, but I can't recall that.

[fol. 190] Q. Well, is that approximately correct?

A. I think it is.

Q. You stated that it would require seventeen and a third additional conductors to supply the sixteen porter in charge operations if the company had to comply with this order?

A. That is correct.

Q. Is that the way that you would do it if the order has to be complied with?

A. Yes, sir.

Q. Could you arrange it so that you could do it any more

economically than that?

- A. No, sir. As a matter of fact, we might go beyond that. Some of these operations would not be very desirable operations, and we might go beyond that, but that is the minimum.
- Q. Now, something is said in the order about the training that a conductor has in respect to the air conditioning on the cars as distinguished from that that a porter has. State what the facts are in that regard.
- A. They have the same instructions. The conductors and porters, in regard to air conditioning. That feature is covered at the service meetings the same as other features, and the porters and conductors receive the same instructions. I think it is pretty generally considered that the porters know more about it than the conductors do. They have had the handling of it. I am not trying to discredit the conductors, but that is common gossip.

[fol. 191] Q. Is this, Mr. Vroman, a copy of the Pullman Company's instructions to conductors?

A. Yes, sir, this is a copy of the most recent instructions.

Q. Is that substantially the same copy as the one that was introduced in evidence at the Commission's hearing?

A. Yes, sir, it is.

- Q. Now, have you a book of instructions there for the porters?
  - A. That is included in this book.
  - Q. The same book?

A. Yes, sir.

Mr. Graves: We offer that in evidence.

(The above referred to document was thereupon received in evidence, the same being marked Plaintiff's Exhibit No. 1.)

Q. The order states that the Pullman porter is not qualified to discipline a passenger on the train. I will ask you to state whether or not the Pullman conductor has author-

ity to discipline a passenger?

A. He has not. The conductor and the porter have the same right in respect to disciplining passengers. If it is some minor infraction each is expected to handle it, but if it is something serious they must both report the matter and apply to the railroad conductor.

Q. Do each have authority to eject a passenger from a

train?

A. No.

Q. If, in the opinion of the porter or conductor, a passenger conducts himself so that there is a call for discip[fol. 192] linary action, what is the duty of either of them?

A. They must go to the train conductor.

Q. Do you know, as a matter of fact, who handles the air conditioning on the train in the majority of cases?

A. The porter. It must be that way because on the larger trains that have eight or ten cars the conductor couldn't attend to the adjustment or regulation of it. He doesn't try to. He doesn't have time. If there is a car that is too cold or too hot he must exercise some supervision over the matter, but if he thinks it needs changing he is to notify the porter, and I suppose in ninety-five cases out of a hundred the porter regulates it entirely.

Q. You mean by regulating, you mean adjusting?

A. Yes, sir, adjusting the control levers.

Q. So as to reduce or raise the temperature?

A. That is right. We have a different temperature for night setting and a day temperature and all of those things. They have to regulate it when they are going through tunnels and other things.

(At this time a short recess was taken, at the conclusion of which the following proceedings were had:)

Judge Sibley: You may proceed, Mr. Graves.

Q. Mr. Vroman, approximately how many Pullman cars are on the average in operation by the company, all told?

A. Well, I think it is about 4500.

Q. What is the approximate number of employees of the company?

A. In the neighborhood of 25,000.

Q. So that on the average the operation of the cars requires about six employees to the car?

[fol. 193] A. Yes, sir, that is the way it works out.

Mr. Graves: That is all now.

#### Cross-examination.

#### Questions by Mr. Morgan:

Q. Mr. Vroman, you have separate schools for the porters and conductors, don't you?

A. At some points.

Q. Well in Texas. My remarks will be confined to Texas, please.

A. No, I think joint meetings were held in San Antonio and El Paso.

Q. Well, now, do you know that?

A. Yes, I know that.

Q. You know that they have joint meetings in San Antonio?

A. Yes, sir.

Q. With whom, now?

A. I beg your pardon.

Q. With whom—between the conductors and the porters?

A. Yes, sir.

Q. Have you ever personally attended any of the schools in Texas?

A. No, sir, I never have.

Q. What you are testifying is from your reports, then?

A. From the records, yes, sir.

Q. Yes, sir. Now, then, you know that we have a law that does not allow the colored people to ride in the same [fol. 194] section of the train with white people?

A. Yes, sir.

Q. And you know that in the Pullman cars only white passengers are allowed to ride there, and do ride there?

A. No, I don't know that.

Q. You don't know that, Mr. Vroman? Well, do you haul in Texas in the Pullman cars colored people?

A. Sometimes.

Q. Under what conditions?

A. If they have a room.

Q. Sir?

A. If they have a drawing room.

Q. Well, you don't allow them to ride out in the Pullman cars with the other passeng rs, do you?

A. I think there is a law that prohibits that in Texas, yes, sir.

Q. Well, actually, they don't do that, do they?

A. I don't know, Mr. Morgan.

Q. All right. Now, Mr. Vroman, you have Pullman cars that accompany the Missiouri Pacific trains from San Antonio to Lustin, don't you?

A. Yes, sir.

Q. And those are in charge of a Pullman conductor?

A. Some of them are; I think they all are.

Q. And you have Pullman cars that accompany the Katy trains?

A. Yes, sir.

Q. From San Antonio to Austin?

[fol. 195] A. Yes, sir.

Q. And those are in charge of a Pullman porter?

A. One of them is.

Q. You pass through the same localities, don't you?

A. Pretty much.

Q. The same communities?

A. Pretty much.

Q. In fact, you use the same tracks for a part of the distance, don't you?

A. I believe so.

Q. Now, then, in one instance you furnish a Pullman porter and a Pullman conductor, and in the other instance you furnish only a Pullman porter, is that correct?

A. That is right.

Q. Now, those passengers who ride on those various trains, in one instance will have a Pullman porter and the other will have a conductor and a porter?

A. That is correct.

Q. You never run a train—when you have a conductor on it you never run a train without the porter, do you?

A. No, I never do.

Q. All right. Now, then, from San Antonio to Fort Worth that same condition exists, doesn't it?

A. Yes, sir.

Q. That I have just outlined?

A. Yes, sir.

Q. And from Houston, don't you have some runs out of Houston, where the same condition exists?

A. Yes, sir.

[fol. 196] Q. Don't you have, in fact, on the Southern Pacific out of Houston—you have that condition, don't you?

A. Well, I don't know just what condition you are re-

ferring to.

Q. I mean by that the point I referred to just a minute ago, that you have some trains that originate at the same point and go to the same destination on which the passengers who ride on those Pullman cars are accompanied by a Pullman conductor, and then on other trains which originate at the same point and go to the same destination they are accompanied only by negro porters in charge.

Mr. Graves: Just a moment. I do not care to have the testimony excluded, but I think we should object to it in order that our position may be consistent, may it please the Court. There is no statute in Texas, no rule—no law of any kind that requires the Railroads or the Pullman Company to maintain identical services on different trains. It is a matter of common knowledge—

Judge Sibley: No; the evidence goes in. You say it doesn't make any difference because there is no law to make

any difference.

Mr. Graves: That is right.

Judge Sibley: All right, go ahead.

Q. Now, Mr. Vroman, on those two trains that we have outlined the same fare is charged, isn't it?

A. You mean the railroad fare or Pullman fare? [fol. 197] Q. Well, we will take first railroad fare.

A. I am not-

Q. Between the point of origin and the destination, do you not know that the same railroad fare is charged—

A. I think it is.

Q. -between two given points?

A. I think it is.

Q. Whether you ride the Missouri Pacific or whether you ride the Katy, the same charge is made?

A. I think so, yes.

- Q. All right. Then, for the privilege of riding in the Pullman car the Railroad Company does charge an extra fare, you know that, don't you?
  - A. Yes, sir.

- · Q. That is one cent a mile, isn't it, in Texas?
  - A. I believe it is.
- Q. Then in addition to paying that extra railroad fare to ride in the Pullman car, the Pullman Company then charges an additional fare?
  - A. They charge for their accommodations.
- Q. Well, that is an additional charge, though, in addition to the railroad fare, and then the extra fare to ride in the Pullman?
- A. It is an additional expense to the passengers. You can't go to the theater without paying for it, and if you ride in a Pullman car you must pay for a seat or berth; that applies on both roads and on all roads.

[fol. 198] 'Q. I understand and your charges are identical in every instance, whether there is a Pullman porter in charge or whether there is a Pullman conductor in charge?

- A. That is right.
- Q. All right; and the same—the same charges are made whether there are 10 Pullman cars or one Pullman car?
  - A. That is right.
- Q. I believe you testified Saturday, did you not, that in your opinion, the Pullman conductor, I mean the Pullman porters—just a minute before I go into that; I want to ask you this question: now, are the porters in charge, the porters, are they given any different or special instructions as distinguished from the regular porters?
  - A. Absolutely.
  - Q. You have different schools for them?
- A. Well, they are given special instructions or in charge work just the same as the conductors would receive; whereas the ordinary porter does not—is not given that sort of instruction. We have some porters that are not qualified to operate in charge, but those that are are given instructions in that line of work.
- Q. Now, your counsel has introduced in evidence here this book of instructions which says "Instructions to Conductors". Now, the first paragraph that I see here says, "Conductors have jurisdiction over and are responsible for the proper performance of duties of all car service [fol. 199] employees on cars under their charge."
  - A. That is right.
- Q. "H is their duty to receive passengers, assign accommodations and make collections therefor, supervise the

service closely". Now, what service do they supervise; just what does that phrase mean "supervise closely"?

A. I think the term "supervise" explains that pretty generally. Supervision means that he is in charge, the same as one person has supervision over any group of employees working under him.

Q. Now, those working under him would be the porters,

is that correct?

A. Yes, sir.

Q. Who else?

A. Well, some trains have maids and some have barbers,

depending on the makeup of the train.

Q. All right. Reading further: "and enforce observance by subordinate car employees of regulations of the company",—is that the duty of the conductors to do that,—"especially those looking to the comfort of passengers"?

A. Yes, sir. .

Q. Now, last Saturday I believe you testified that in your opinion the Pullman porters were better qualified to take care of the situation where there were people drinking or failing to observe proper decorum on the train, than was a Pullman conductor?

A. I don't think I said that. I said that I thought that a Pullman porter is better able to handle a drunk passenger. [fol. 200] I didn't say general decorum. There might be a fight between two passengers that probably the conductor would be better; but to wait on intoxicated people, I think the porter is better able to handle the situation.

Q. Well, you testified before the Commission when we

had a hearing in Austin, didn't you?

A. Yes, sir.

Q. Do you recall your testimony in that case where you said that—reading from page 109, "Q. I am talking about drinking, whether liquor is sold or not, I don't know about that. I know it is not sold in Texas. A. Yes, there is a lot of drinking. Q. Where there is drinking do you think a white man will allow a negro porter to correct him and tell him what to do? A. I would suppose he wouldn't want anybody to tell him what to do. Q. You know, do you not, that a white man in Texas is not going to allow a negro to give him orders, and that he would come nearer to allowing a white conductor to instruct him? A. I presume that is true."

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A. Well, I still contend that neither a porter nor a conductor has got any license to discipline a passenger. If a porter can persuade a passenger to do something by reasoning with him, I don't call that discipline; that is simply using a little tact. I have not changed my mind about that.

Q. Well, you just changed your testimony, is that all?

A. No, I haven't changed my mind.

Mr. Morgan: I think that is all.

[fol. 201] Judge Sibley: I would like to ask just for information, what the Texas Commission does about Pullman charges. Do they fix them intra-State?

The Witness: No. sir.

Judge Sibley: You fix them?

The Witness: Yes, sir, the Interstate Commission-

Judge Sibley: The Interstate Commission has no function there, has it?

The Witness: Yes, sir, the Interstate Commerce Commission—our rates are determined by the Interstate Commerce Commission. I am not an expert on rates, Judge, but I know that the Texas Commission does not fix them.

Judge Sibley: Any of them?

The Witness: No, sir, we have a rate man here that can explain that.

Judge Sibley: All right.

Judge McMillan: This order makes some collateral regulations with regard to rates. What do they predicate that on?

Mr. Graves: I assume that they predicate it on their rate making authority. There is a provision in this order that they shall not charge for riding—charge passengers for riding in the porter in charge cars where the Railroads receive any part of the Pullman fares.

Mr. Pollard: If the Court please, in 1906 the Texas Com-[fol. 202] mission undertook to fix the rates of upper berths

in Pullman cars-

Judge McMillan: Did the Circuit Court of Appeals hold they couldn't do that?

Mr. Pollard: The District Court for the Northern District of Texas held that the Commission had no authority over the Pullman Company; that was in 1906 and 1907. There has no law been passed since.

Judge Sibley: I did not want to divert the case. I simply asked for information.

Mr. Graves: Yes, sir.

Judge Sibley: Go ahead with the examination.

· Redirect examination.

### Questions by Mr. Graves:

Q. Mr. Vroman, on the long trains where you have two or more Pullman cars, how many conductors—Pullman conductors do you have?

A. One. We have no train that—I don't think we have a train—I think there is one train out of New York that operates two conductors, on account of the large number of cars—12 or 14 cars; but ordinarily one Pullman conductor is provided for all trains.

Q. And you have some long trains that go through the State of Texes that have several Pullman ears on them, don't you?

A. Yes, sir.

Q. And regardless of the number of cars on those trains you have only one conductor?

A. That is correct.

Q. You mentioned barbers and maids. Do some of the [fol. 203] trains also carry attendants in charge of the lounge car?

A. Yes, sir.

Q. Where those attendants are Pullman Company employees, does the Pullman conductor on the train have general supervision over them?

A. They come under the supervision of the conductor, the

same as the porters.

Mr. Graves: That is all we have.

Recross-examination.

'Questions by Mr. Morgan:

Q. You don't have any barbers and maids on the Pullman trains in Texas, do you?

A. No, sir.

Mr. Graves: Well, do you know?

A. I think there are barbers on the Sunset Limited, but they are not Pullman employees.

Mr. Morgan: That is all.

(Witness excused.)

Judge Sibley: Call your next witness.

Mr. Graves: Mr. Bradish.

L. M. Bradish, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

### Questions by Mr. Graves:

Q. Your name is L. M. Bradish?

A. Yes, sir, it is.

[fol. 204] Q. What is your official connection with the Pullman Company?

A. I am Assistant Comptroller.

. Q. You live in Chicago?

A. Yes, I do.

Q. Your office is in Chicago?

A. It is, yes, sir.

Q. You have to do with the Accounting Department?

A. Yes, sir.

Q. First, I want to ask you, Mr. Bradish—well, how long have you been in the service of the Pullman Company?

A. Since 1892.

Q. You testified at the Railroad Commission hearing on August 31st, did you not?

A. Yes, I did.

Q. Have you computed the expense that would devolve upon the Pullman Company in the way of additional salaries—conductors salaries, as a consequence of compliance with the order that is now in dispute, the Railroad Commission order?

A. Yes, I have.

Q. What would be the cost of the Pullman Company?

A. \$25,600 per annum.

Mr. Lewis: If the Court please, we desire to object to that question and answer and move that the answer be stricken, for the reason that it calls for a pure conclusion, and it has not been shown by what method he arrived at that figure.

[fol. 205] Judge Sibley: Well, as to the first objection, I overrule it. As to the second, I think that is a matter of

cross examination; you can ask him about that.

Q. Now, what was the figure you gave, Mr. Bradish?

A. \$25,600 a year.

Q. Is that the net cost or is that the gross expense to which the company would be subjected?

A. That is the gross expense, that is the expense to which

the Pullman Company-

Mr. Morgan: If Your Honor please, we further should like to object on the ground that the mere fact that this order if put into effect would cause some expense is no criterion to determine whether or not it is unconstitutional.

Judge Sibley: It is no final criterion but I think it is an

element to be considered.

Judge McMillan: It would go to show the jurisdictional

amount, too, wouldn't it?

Mr. Morgan: I assumed, Your Honor, the jurisdiction had already been established. We further call the Court's attention to the fact that this order does not require anything of the Pullman Company. It is directed only to the Railroads.

· Judge Sibley: Well, they are partners, you know; both

are deeply interested in the case.

Q. Mr. Bradish, I still vant to know whether that figure is the—whether that is the total amount of salaries that would be paid to the additional conductors that Mr. Vroman [fol. 206] said the company would have to have.

A. That is correct; that \$25,600 would be the additional pay to the conductors that we would have to pay—the Pull-

man Company.

Q. Well, under your contracts with the Pullman conductors?

A. Yes, under the contracts-

Judge Sibley: What about the saving on the salaries of the porters in charge?

The Witness: That is the net. Judge Sibley: That is the Net?

The Witness: That is the net, \$25,600.

Q. That is what I am trying to find out;—what is the gross amount of salary, approximately?

A. \$41,200, I-believe it was.

Q. All right. Now, when you subtract the amount that you now have to pay if you had no porter in charge operations—

A. Yes, sir.

Q. —that would reduce it to what?

A. In total, that would make it \$36,100, in total.

- Q. All right. Now, then what happens as to the difference between the \$25,000 and the \$36,000—how do you account for that?
- A. That the Railroad Company would have to have a certain difference of \$10,000.
  - Q. Under the contracts?

A. Under the contracts.

Q. Between the Pullman Company and the Railroads operating under contracts?

A. Yes, sir.

[fol. 207] Q. Operating the Pullman cars under contracts?

A. Yes, sir, that is right.

Q. I will ask you to state, Mr. Bradish, whether these are copies of the contracts between the Pullman Company and the Railroads operating these porter in charge trains in Texas? (Counsel hands several documents to witness).

A. Yes, they are.

Q. You are familiar with those contracts?

A. Yes, I am.

Q. These are correct copies of them?

A. Yes.

Q. These are the current contracts, the contracts that are now in force?

A. Yes.

Mr. Graves: We offer them in evidence, may it please the Court.

(Thereupon the contracts above referred to were marked as Plaintiff's Exhibits Nos. 2 to 14, inclusive.)

Q. Now, the contracts that were in effect at the time the hearing was held by the Commission last August were introduced in evidence at that time, were they not?

A. They were submitted and they took extracts from the

contracts; they were not filed.

Q. Well, Mr. Morgan called on the Pullman Company to furnish copies of the contracts, did he not?

A. Yes, he did; he did.

Q. You furnished them, did you not? [fol. 208] A. Yes, he had them.

Q. Yes.

- A. He had them.
- Q. Now, then, these are the same contracts, except as to the contracts that have been entered into since that date?
  - A. That is correct.
- Q. And you have substituted the new contracts where there have been changes?
  - A. The new contracts are there, yes, sir.
- Q. In other words, the contracts between the Pullman Company and the Railroads which had expired under their terms in the interval have been substituted by new contracts?
- A. There have new contracts been issued. I think the old contracts, possibly, is not that contract.

Mr. Culbertson: We make the objection, if Your Honors please, that as to the new contracts made since that time, that we do not know exactly what the terms of the new contracts are, whether they vary the terms of the old contracts, and so far as they do, we object to the introduction; and we make a further objection to these contracts that the parties rights having expired under the contracts at the time of the hearing and these contracts having been made since the order went into effect, that they cannot be heard to object in this case, coming in here under contracts made after the order was entered into.

Judge Sibley: Well, this is a legislative order and it works like the law. Whether it is unconstitutional now seems to be the question and the contracts now, it seems to [fol. 209] me would be the very point, if they have any effect at all. I think the present contracts should be in.

Q. I believe in this group of contracts that you have identified in the two instances where there are new contracts that have been entered into since the Commission hearing, the copies of the old contracts are here also.

A. Well, they are, the old ones and the new ones.

Mr. Graves: So we offer in evidence, for the purpose of comparison, the old contracts as well as the new ones.

- Q. Mr. Bradish, do you know whether the compensation that the porter will receive under the Railroad Retirement Act after they have retired will be influenced by the salary that they receive while they are in active service?
  - A. Yes, they will be affected.
  - Q. Well, will they-

A. That is, their pension depends upon their earnings; if they get less earnings they get less pension, and if they get more they get more.

Mr. Graves: That is all.

Cross-examination.

# Questions by Mr. Morgan:

Q. Mr. Bradish, all these contracts, do they not have one point in common, namely, that the Pullman Company is guaranteed a certain definite return before the Railroad shall share in them?

A. No, sir.

[fol. 210] Q. Sir?

A. It does not provide for any return; some of them provide that the Pullman Company's expenses will either be taken out of earnings, or in the event the earnings are less than the expenses, then in some instances the Railroads will make up the difference between the two.

Q. That is true. In other words-

A. But they do not guarantee any return.

Q. The Pullman Company is to receive a fixed amount, let's see, of \$8,000 or \$7,500 per year per car, what you call operating expenses?

A. Yes.

Q. Isn't that true?

A. They will if the cars earn it. Some of them provide that the—as I say, the Railroads will make up the difference, but other contracts don't provide for that.

Q. Well, now, can you cite the ones that do not so provide?

A. All the contracts?

Q. Yes, sir.

- A. I can give you some that do not. The T. & P. do
  - Q. The T. & P.?

A. That is one.

Q. Well, what is your arrangement with the T. & P.?

A. That contract provides that the revenue in excess of \$9,000 per car per annum will be divided as between the Pullman Company and the Railway Company, 50 per cent each.

Q. In other words, the first \$9,000 that the car earns will go to the Pullman Company?

A. If they earn it.

[fol. 211] Q. Yes, sir; and then the earnings, if any, over and above that amount, will be divided equally between the T. & P. and the Pullman Company?

A. Any earnings above \$9,000, that is correct.

- Q. Now, isn't that same general plan, varying in amounts as to the gross, isn't that same general plan provided in each of your contracts?
- A. No, most of the contracts provide that we will recover use of the gross earnings first for our expenses.

Q. Yes, sir.

- A. Second, we will get an initial return of \$1,000 per car per annum, and then all above that will be divided equally between the two interests.
- Q. Well, now do I understand you to say that it provides, first, that you shall be guaranteed your expenses?

A. You didn't let me quite finish.

Q. I mean your operating expenses; I mean the money that comes in, you are first to get your operating expenses if that amount is made, is that correct?

A. Yes, if it is we will get it.

Q. And then the first thousand dollars over and above that you are to get that?

A. That is right.

Q. And then the earnings above those two items, if any, are to be divided between the Railroads and the Pullman Company?

A. That is correct; that is correct.

Q. Therefore, if this order is put into effect, the additional charges, if any, that are charged against the operation [fol. 212] of the cars, will under these contracts, be taken into consideration, and they will be an additional expense that comes under the first item that the Pullman Company—

A. Yes, it goes in to increase the expenses.

- Q. Therefore, before you participate in the second item, namely, a thousand dollars, or before the Railroads participate in the third item, the earnings over and above the first two, this additional expense, if any, would have to be paid?
  - A. Yes, yes.

Q. And that would be taken care of, then if the first initial operating expenses, along with the other expenses?

A. It would go in with the other expenses.

Q. Yes, sir. Now, then, this per car—these Pullman cars that operate in Texas operate under the entire system; you don't limit any one car to a specific locality do you, Mr. Bradish?

A. Cars are usually assigned to lines, but, as you say, they would be taken off of its line and run in other lines.

Q. And when you are including the expense of each car, then the profits, if any, over and above the expenses, you figure that on the entire system, don't you, of a railroad?

A. Of a railroad, yes, the entire system of cars.

Q. In other words, your contracts with the Missouri Pacific are not limited to earnings made in Texas, or any other State, but are taken of the entire system of the Missouri Pacific lines?

A. That is right.

[fol. 213] Q. Well, that same thing is true of all other railroads, isn't it?

A. Yes.

Q. And this expense item, if this order goes into effect, and you say it would cost you so much money, that likewise would be spread all over the entire system of a railroad, wouldn't it?

A. Yes, it would.

Q. And would not be limited, of course, to any one State?

A. No.

Q. Now, Mr. Bradish, according to your calculations, do I understand you to say that the total cost to all the Railroads in Texas, if this order is put into effect, would be \$10,500—is that your statement?

A. I don't think so.

Q. Sir?

A. I don't think so.

Q. Well, what did you say about that?

A. I said the expenses to the Railroad Companies would be \$10,500. That would be an expense to the Atlantic Coast Line, if you please.

Q. Sir?

A. Part of that would be an expense to the Atlantic Coast Line; they would have to stand part of that; every Railroad in the United States would bear part of that.

Q. Every Railroad in the United States?

A. Yes, sir.

Q. It would not be limited, then, just to the Texas roads, [fol. 214] is that right?

A. That is correct.

Mr. Morgan: That is all.

Redirect examination.

### Questions by Mr. Graves:

Q. Mr. Bradish, have you made some calculations to determine what Railroads in the State of Texas did share in the expense and to what extent?

A. Yes, I have.

Q. How many of the Railroads that are parties to this suit would share in the expense?

A. There is five of them that would have to bear part of

the expense.

Q. Can you tell us who they are, and approximately what it is?

A. The Kansas City Southern is small; it would be around about—

Mr. Culbertson: Now-

# A. The Kansas City Southern—

Mr. Culbertson: Excuse me, if Your Honor please, we want to object to the witness expressing an opinion as to how much each Railroad would have to bear, because that would be a matter for the Railroads themselves, taking into consideration their own accounting problems, to determine as between the cost of operations and the gross receipts taken over their entire lines, and then considered in respect [fol. 215] to their entire lines in Texas; in other words, my objection goes to this point, that unless this witness is qualified to give the gross receipts of, say, the Missouri Pacific of all the passenger traffic over its lines in Texas, the total receipts from that traffic, and the part of these expenses which are allocated to that traffic, why then, he is not competent to testify how much of this charge would go to that Railroad Company.

Judge Sibley: It doesn't seem to me that it is fortifying the constitutional part of the order for us to know what they did with the expenses in their account; and it looks like to me that if the expense dropped on somebody it shall fall on everybody, and the initial instance would be the thing we are concerned with; but how much of it they passed on to one another we wouldn't be concerned with. That is the way it strikes me.

Mr. Culbertson: I don't know whether I made myself clear, and I don't want to be a bore to the Court, but United States Supreme Court, as we understand it, has held that in order to determine whether a rate or a charge under an order is unreasonable or confiscatory, it is not enough just to show some expenses and show how much it would cost—

Judge Sibley: Well, there is no claim of confiscation here that I have heard. There is none in the pleadings; they just claim you are being an unreasonable burden on them.

[fol. 216] Mr. Culbertson: Yes, sir, the same Railroad that I am contending for, Your Honor, in order that I might get my objection into the records, is that in order to determine the reasonableness of a rate it is not sufficient to say that it costs so much to operate a particular line, but the ratio of the cost to the entire receipts of the particular line from a particular kind of traffic must be determined for the purpose of finding out how much it is going to cost.

Judge Sibley: Well, somebody has got to pay it. If it is unreasonable it doesn't seem to me to matter who has to pay it, and if it is unreason-ble the Court wouldn't care who pays it if it is unreasonable; somebody has got to pay it. I don't see any use in wasting time as to the trickles that this cost takes among the Railroads. I would never get to the end of that, personally, in my own mind. We will leave out the accounting methods between the Railroads whereby they shift and participate in their own troubles.

Mr. Graves: We do not demur to the Court's ruling; the only thing we would want to call attention to the fact that counsel has misconceived the effect of these contracts, and I am sure that if he studies the contracts, he will find that he has made an incorrect statement as to how this expense is allocated:

Judge Sibley: Well, the contracts are in evidence. If either side can make anything of them, why, they are here.

Q. What is the average expense per car for operating the Pullman cars?

[fol. 217] A: About \$9700 per car.

Q. Per annum?

A. Per annum, per annum.

Judge Sibley: That is where you take conductors into account, of course.

The Witness: Everything, your Honor; all expenses.

Q. Well, included in that average, have you included the porter in charge operations?

A. Yes, that cost is in there.

Q. In other words, that is the general average per car of the Pullman Company's costs of operating the cars over the country?

A. That is right.

Judge McMillan: Is that each individual car that costs

\$9700, or are you speaking of cars as a unit?

The Witness: That is the average, Your Honor; that is what we call an actual service—that is, that is on the car that is moving.

Judge McMillan: When the car is in service. The Witness: That is the margin, that is all. Judge Graves: That is all, Mr. Bradish.

(Witness excused.)

[fol. 218] Mr. Graves: We will have Mr. T. C. Olney.

T. C. Olney, a witness for plaintiff, having been duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. Your name is T. C. Olney?

A. That is right.

Q. What is your position with the Pullman Company?

A. District Superintendent at New Cleans.

Q. How long have you been with the 'ullman Company?

A. Well, let's see, this is the 42nd yer.

- Q. How long have you been working for the Company at New Orleans?
  - A. Nearly 25 years.
  - Q. Nearly 25 years?

A. Yes, sir.

Q. Have you been in the capacity of District Superintendent during all of that time?

A. Yes, sir.

- Q. Do you have under your immediate supervision all of the porters and all of the—all of the Pullman porters and all of the Pullman conductors that operate out of New Orleans?
  - A. I do.

Q. Approximately how many?

- A. Well, right now we have, I think 275 porters and 32 conductors.
- Q. By the way, are those porters—are they Northern men or are they Southern men?

A. I think every one is a Southern man, I can't think [fol. 219] of any that is not.

- Q. Do you have any porter in charge operations under your supervision out of New Orleans?
  - A. Yes, we operate right now 48 porters in charge.

Q. Out of how many lines, operated?

- A. Nine lines.
- Q. How is that?
- A. Nine lines.
- Q. Nine lines?
  - A. Yes, sir.
- Q. How many lines, all told, operate out of New Orleans, in your District?
  - A. I think it is 48 now.
- Q. Forty-eight, and nine of them are porter in charge lines?
- A. Of course, some of them are just for a portion of the trip, you understand.
- Q. Yes. Well, if a porter is in charge during any part of a trip you characterize that as a porter in charge line?
- A. Yes, because his full time is carried as porter in charge.
- Q. How long, Mr. Olney, have you had operations known as porter in charge operations in the New Orleans District?
- A. Well, almost the entire time that I have been there; I would say about 24 years.
  - Q. About 24 years.
- A. Twenty-three or 24 years, perhaps longer than that; I am not sure.
- Q. How many complaints during that time have you had of mistreatment by the porters in charge of women passengers?

Mr. Morgan: If your Honor please, we submit that that [fol. 220] is not material, as to what happened down in

New Orleans. We are not investigating the entire system. We submit that it is not admissible.

Judge Sibley: Is this Texas territory in your District? The Witness: I have many lines; I probably operate 150

porters through Texas.

Judge Sibley: Well, I don't know that that is any reason for not hearing it. Of course, the South has a peculiar problem as a whole. I don't think it is any different in Texas from what it is in the South as a whole. It seems to me that this general experience over the entire territory would be of some help

Mr. Graves: I think possibly, Your Honor misunderstood him also. I think he said he had many lines in Texas under

his supervision.

Judge Sibley: Yes, sir, and some are not under his supervision.

Mr. Graves: That is right.

Judge Sibley: I think his experience in the New Orleans territory would be fairly illustrative of what might be experienced in Texas. That is what I am trying to say.

Mr. Graves: We would further say that this order condemns these men because they are negroes and not because

they are Texas men.

Judge Sibley: Well, it may appear that way, but that is not the language of the order, I don't suppose.

Mr. Morgan: No, Your Honor, we submit there is no [fol. 221] provision such as that contained in the order.

Judge Sibley: Yes, you are correct about that. The order

does not say anything of the kind.

Mr. Morgan: Note our exception to the ruling of the Court, on the other question; not on this, but on my original objection.

Mr. Graves: Well, will Your Honor indulge me long

enough to read just a sentence from the order?

Judge Sibley: All right. After all, the construction of the order on this couldn't affect the examination of this witness, could it?

Mr. Graves: No, sir, but we didn't make a full statement

of our case at the beginning here.

Judge Sibley: I understand that perfectly. All of the porters are colored men. That has been testified to.

Mr. Graves: That is right.

Judge Sibley: I don't know that it is fair to say it does so and so on that basis.

Mr. Graves: All right. May it please the Court, section 16 of the findings made a part of the order and on which the order rests, findings of the Commission, are as follows:

"The Commission further finds from the evidence that the porters on Pullman cars are negro men. The Commission further finds that if negro men porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with, that there is imminent danger of insults to the lady passengers on the Pullman cars, and that such condition exists in the 17 operations by the Pullman Company where they do not use conductors, as hereinabove [fol. 222] referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination."

Judge Sibley: You want to prove the untruth of those findings?

Mr. Graves: Yes.

Judge Sibley: And I ruled that you could do it in the New Orleans territory.

Mr. Graves: Yes.

Judge Sibley: What are we fussing about?

Mr. Graves: We have no complaint at all, Your Honor. Judge Sibley: Go ahead.

# By Mr. Graves:

Q. I don't believe you answered the question..

A. No, I never have—I can't recall, and have no record of ever having received a complaint of that kind because of a porter in charge.

Q. Mistreatment of women passengers on a car where

you had a porter in charge?

- A. Nor any other complaint because of a porter being in charge.
- Q. How long have you been District Superintendent, Mr. Olney?

A. Since 1908. That would be 32 years.

- Q. Did you act in that capacity at any other southern place, places in the south?
- A. Chattanooga and I was assistant at Louisville, Kentucky.

Q. How long were you at Chattanooga?

A. From 1908 to 1915, that would be 7 years.

[fol. 223] Q. This Line No. 3010, the operation from New Orleans to Oakland, California, that is under your jurisdiction. That is the porter operation?

A. Yes, sir.

- Q. The porters that operate on that line originate at New Orleans? That is, do they work out of New Orleans, or out of California?
  - A. Out of New Orleans.
- Q. Those porters on that car that leaves New Orleans on that—what is the name of the train?
- A. Gulf Coast Lines, a subsidiary of the Missouri Pacific Lines.
- Q. Those porters that travel on that train come from New Orleans to Oakland, California, and return?
  - A. They do.
  - Q. Who hires the porters in your district?
  - A. I do.
- Q. What investigation do you make for the purpose of determining whether a porter is a satisfactory man before you hire him?
- A. We investigate all employees for at least five years back, and we endeavor to personally interview every employer, not by mail, but personally interview them.

Q. You personally interview all of the persons who have employed the applicant for the job?

A. Yes, sir.

Q. For a period of five years?

[fol. 224] A. Yes, sir, and we cover every month, try to cover every month of that five year period.

Q. What else do you do?

A. Well, sir, of course, we size them up as to apparent character and appearance and personality. That has an importance, but naturally the employers for the five years will give us most of the information that we need.

Q. After they are employed what steps are taken by the District Superintendent looking to the supervision of the

men?

A. Well, we make these inspection trips. I will say in my district there are four of us who make a weekly trip, and that—we go out very often and get off a train in the middle of the night and come back and catch them without their knowing we are out on the line.

Q. The District Superintendent travels on the train some,

too?

- A. I make at least a trip a week, and my assistant does, and we have two commissary agents who make a trip a week, each.
- Q. You have traveling inspectors who do nothing else? A. Yes, our traveling inspectors, not assigned especially to this district, but they ride the line that way, and inspect it from the eastern zone, ride the line to the east from New Orleans.
- Q. And they supervise the work of the Pullman porters and conductors?

A. Absolutely, the same supervision for both.

[fol. 225] Q. What different character of instruction, if any, do you give the conductors from the nature of instruc-

tions that you give the porters?

A. Well, they are the same for the conductors, and men who operate in charge, operate with the conductors. They have the same rules, same rule book, and same instructions as to clerical work and handling of their reports, also as to handling the passengers in all respects.

Q. The porter in charge receives the same instructions from the company periodically and all of the time that the

conductors do?

A. Exactly.

Q. Mr. Olney, who determines primarily whether a given Pullman line shall be a porter in charge line or shall be a conductor in charge line?

A. Well, I would, in New Orleans.

Q. The lines operating out of New Orleans-

A. I would recommend according to the character of the line and whether it should be a conductor or should be a porter. That would be for the lines that I operate.

Q. What qualifications are taken into account in making that recommendation? What actuates you in making the

recommendation?

A. Well, I will have to say frankly if there is only one car on the train, I would always recommend a porter in charge because my experience has been that not only is the in charge work handled as well, but then both work is done better by a man who runs in charge than a man who doesn't [fol. 226] run in charge. He feels his responsibility.

Q. They have to make certain reports to the Pullman Company, something in the nature of paper work, diagrams and so forth. I will ask you to state how the reports of

that kind made by the porters in charge compare with the

reports made by the conductors?

A. Well, just as good, as far as I know. Of course, there are some porters the are better than others, and some conductors better than others in their handling of reports, but I will say that very few diagrams come back from the auditor on account of a clerical mistake on account of the porter in charge.

Q. Now, you have meetings attended by the conductors, and then you have meetings attended by the porters; is

that right?

A. That is right.

Q. At those meetings do the porters in charge receive any different instructions from what the conductors do?

A. No, they do not.

Q. Do they receive the same instructions?

A. Identical instructions. •

Q. Do you conduct those meetings, or how are they conducted?

A. I conduct them, and others take part in the meetings, certain features.

Q. What steps does the company take to see that the Pullman cars, when they start on the trip at New Orleans, and at district points, are in charge of proper service employees?

A. The same they would for a conductor line. They are [fol. 227] inspected by the platform man; the men are in-

spected to see if they are in good condition.

Q. Take this train you have referred to as an illustration, the car that runs from New Orleans to Oakland. When the car leaves New Orleans on its regular run, and before it leaves, does the Pullman Company have anybody at the station or at the train to inspect these men that go out on that train?

A. Absolutely. Every train is sent out by a representative of the company, usually a platform man, or myself, or an assistant.

Q. That is all, gentlemen. .

Cross-examination.

### Questions by Mr. Morgan:

Q. Mr. Olney, if there should be any irregularities on the part of the Pullman porter while he is in charge, who would report that? Would he?

A. The train conductor, I presume. He is in charge of the train.

Q. I understand, but has that ever happened?

A. I can't remember a single case.

- Q. All right. Now, when you are taking into consideration whether you shall have porters in charge, or conductors in charge, isn't the cost item of what it will cost the company, isn't that one of the things that you take into consideration?
- A. Well, naturally, I am interested in the expense, but the service is a major consideration, always has been, always [fol. 228] will be.
- Q. Mr. Olney, hasn't it in recent years been the practice of your company to take off conductors more and more and put more and more porters in charge?

A. I can't say it has at New Orleans.

- Q. I believe the testimony here Saturday—I don't know whether you were here or not, was to the effect that in Texas alone there were some four or five conductors taken off in 1939, in Texas, and within the last two or three years there were some six or seven, or practically half of the operations in Texas where there is no conductor, is a result of a change that has been made within the last two or three years. Does that same condition prevail now?
- A. Well, only—if there was any change it would be because business is less, and they have taken the other cars off the line and there was only one car on the train.

Q. That tendency is increasing, isn't it?

A. Not at New Orleans.

Q. Sir?

A. I have just about as many men in charge as I did twenty years ago, and no more.

Q. I think that is all.

Mr. Graves: That is all.

(Witness excused.)

[fol. 229] Judge Allred: Go ahead, Judge.

Mr. Graves: Is the Court going to take any recess this morning?

Judge Sibley: We took one. Do you want another?

Mr. Graves: No, but the order of what we were planning to do might depend on that.

Judge Sibley: If you desire to have a recess taken we would be glad to take it.

Mr. Graves: I wish you would give us five minutes. Judge Sibley: We will take a five minute recess.

(Thereupon Court was recessed from 10:45 A. M., until 10:55 A. M.)

Mr. Graves: May it please the Court, we have some disinterested witnesses here, citizens, and out of logical order, we would like to put them on the stand to accommodate them.

Judge Sibley: All right.

Mr. Graves: There are four of them here at the present time, and would the Court like to have them all sworn at once, to save time?

Judge Sibley: Yes, sir.

Mr. Graves: I will ask Mr. Caldwell, Mr. Mitchell and Mr. Fisk and Mr. Marsh to stand up and be sworn.

[fol. 230] Judge Sibley: Please sit right there at hand. Take seats so that you can come to the witness stand promptly. Who is the first?

Mr. Graves: Mr. Caldwell is first.

THOMAS J. CALDWELL, a witness produced by the Plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

### Questions by Mr. Graves:

- Q. Your name is Thomas J. Caldwell.
- A. Yes, sir.
- Q. You live in Houston.
- A. Yes, sir.
- Q. What is your business, Mr. Caldwell?
- A. Banking.
- Q. Well, you are Vice President of the
- A. Union-
- Q. -Union National Bank of Houston?
- A. That is right.
- Q. You were born in Austin, were you not, Mr. Caldwell?
- A. Yes, sir.
- Q. Did you live in New Orleans for a while?
- A. About four years.

Q. Connected with the bank there?

A. Yes, sir.

Q. How long have you been connected with the Union National Bank as Vice President?

[fol. 231] A. About 13 or 14 years.

Q. Mr. Caldwell, in recent years have you had occasion to travel on the train frequently or infrequently?

A. Rather frequently.

Q. Has your traveling been confined to the State of Texas, or have you traveled generally ever the country?

A. Practically all over the United States.

Q. Practically all over the United States. In your travels, have you traveled any on trains where the Pullman car was in charge of a Pullman porter, and where the train was not accompanied by a Pullman conductor?

A. Upon some occasions, yes.

Q. Do you happen to recall any particular train of that

character that you have traveled on?

A. Well, I think that coming back from Seattle to Houston last October I was on a car that the negro porter was in charge of. I have occasion frequently to go to San Angelo, and until recently the Pullman from San Angelo went to Dallas and I would go to Brownwood and get on the Houston-Pullman there, and I think that car to Brownwood from San Angelo was in charge of a negro.

Q. This trip you made from the west cost to Houston, do

you recall whether that was over the Santa Fe?

A. Yes, that was on the Santa Fe. I took the Santa Fe at San Francisco.

Q. Did you come through Clovis and Sweetwater?

[fol. 232] A. Yes, sir.

Q. Mr. Caldwell what is your—what has been your impression of the quality of the service rendered by the porters in charge of these cars as compared with the service rendered to Pullman passengers on the trains where a conductor was present?

A. I think it is quite as good in every respect that I have

been able to notice.

Q. I will ask you to state whether you would have any hesitancy about entrusting any members of your family, the ladies, or your wife, or your daughters, to the care of one of these Pullman porters?

A. I have never thought of such a thing. I wouldn't have the slightest hesitation, as far as I am able to feel now.

Q. Have you observed any more disorder on these trains, or on these cars where the porter was in charge than you have observed on any other trains?

A. No, sir.

Q. As a matter of fact—

Judge McMillan: Please speak out so that the stenographer can get your answer.

A. No.

### By Mr. Graves:

· Q. As a matter of fact, how much disorder have you observed on the trains? How much drunkenness and carousing?

A. Very, very little. is remarkable how little I have

observed on the Pullman cars.

Q. That is all.

[fol. 233] Cross-examination.

#### By Mr. Lewis:

Q. Mr. Caldwell, do you have—have you had any difficulty with the porter being able to calculate the amount of your passage?

A. Well, I don't know that that question has ever arisen

with me.

Q. Where do you buy your tickets?

A. I always buy my ticket before I get on the train.

Q. Do you ride on a pass or not?

A. No, sir.

Judge McMillan: Answer out so that I can hear, and so that the Reporter can hear.

A. No, sir.

# By Mr. Lewis:

- Q. Does your bank carry railroad accounts?
- A. Yes.
- Q. You say you would have no hesitancy in entrusting your wife and daughters on one of these Pullman cars, that is, attended only by a Pullman porter, in the event there

were boisterousness or drunkenness on that car, wouldn't you prefer to have a Pullman conductor there?

A. I wouldn't say so. It never occurred to me to hesitate

on that account.

Q. With drunkenness on there, and some man trying to be boisterous, wouldn't you be better satisfied with your wife on there if the car were in charge of a Pullman conductor? [fol. 234] A. I don't think so. I think she would be perfectly safe under any circumstances. That would be my feeling.

Q. That is all.

Mr. Graves: That is all, Mr. Caldwell, thank you very much.

(Witness excused.)

Homer R. Mitchell, a witness in said cause produced by the Plaintiffs, having been first duly sworn, testified as follows:

#### Direct examination.

# Questions by Mr. Graves:

- Q. Your name is Homer R. Mitchell?
- A. Yes, sir.
- Q. You live in Dallas?

A. Yes, sir.

Q. How long have you lived in Dallas?

A. 36 years.

Q. You are in the insurance business.

A. Yes, sir.

Q. You admit you are a lawyer also, do you?

A. Yes, sir.

Q. Mr. Mitchell, have you had occasion in recent years to travel frequently on the trains in Texas?

A. Yes, sir.

Q. Have you traveled on a train where the Pullman car [fol 235] was in charge of a porter, and where there was no Pullman conductor on the train?

A. Yes, sir, I have.

Q. Have you noticed any difference in the service rendered to the Pullman passengers on those cars from the service rendered where a Pullman conductor was present?

A. None at all.

Q. Do you know any of those porters that operate regularly on these trains in Texas?

A. Oh, by sight, yes, and a few of them by their—some

sort of name.

Q. By their familiar name?

A. By their familiar name, yes, sir.

· Q. Referring to that type of porter, I will ask you to state whether you would be willing to entrust the female members of your family in their care on a train on a trip as a Pullman passenger where the train had no Pullman conductor on it?

A. I would: I would have no hesitation about it.

Q. Have you ever noticed any trouble on the trains where there was a porter in charge of the Pullman car?

A. I can't recall any.

Q. That is all, gentlemen.

Cross-examination.

### Questions by Mr. Lewis:

Q. Mr. Mitchell, you say you are in the insurance business?

A: Yes, sir.

[fol. 236] Q. Now, are you carrying either the insurance for the Pullman Company or the railroads?

A. No, sir.

Q. Not interested in that insurance?

A. No, sir.

Q. This—what about the cleanliness of these cars? Have you noticed any difference between those attended by a Pullman porter acting in both capacities from those that are also supervised by a conductor?

A. No, sir, I have no recollection of having noticed any.

Q. Have you noticed the condition of the cars in either event?

A. I think in a very general way I have noticed, of course, but I bear no recollection of the distinction in the two.

Q. Have you ever noticed any of the cars out of good condition, in the way of cleanliness?

A. I don't recall having seen one, except on the regular rounds, they will come around, a slight necessity for their mopping up, but that was temporary and being attended to. Q. In the event of boisterousness or drunkenness on the Pullman car would you prefer that a Pullman conductor be

there with the porter or not?

A. I can't believe that I would have any reason one way or the other. I am unable to say definitely that I would prefer it one way or the other. I think at least anything that I could anticipate would be about as well handled one [fol. 237] way as the other.

Q. Are you able to say how many times during the past year you have ridden a Pullman car which did not have a

conductor in charge?

A. Well, I travel, of course, a good deal, between here and Dallas, and it is probably in charge—probably left in charge of a porter, and going back in the afternoons, that is frequently without a conductor, a number of times, and I sometimes make frequent trips, and then it would be infrequent for a period of time, but ten or a dozen trips a year.

Q. You always get your ticket before you get on the car?

A. Yes, I think I have always done so.

Q. That is all. Wait just one second. Would you send your little granddaughter in a Pullman ear with only a Pullman porter in charge?

A. I think so.

Q. Over a long trip?

A. Yes, sir.

Q. That is all.

Mr. Graves: That is all. Thank you.

(Witness excused.)

[fol. 238] Charles A. Fisk, a witness produced by the Plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

# Questions by Judge Graves:

Q. Please state your name, Mr. Fisk.

A. Charles A. Fisk.

Q. Where do you live?

A. Amarillo.

Q. How long have you lived in Amarillo?

A. About 35 years.

Q. What is your business, Mr. Fisk?

A. Banking.

Q. Vice President—

A. Vice President of the First National Bank.

Q. Vice President of the First National-Bank of Amarillo. Have you had occasion to travel frequently on trains in recent years?

A. Yes, sir.

Q. Do you remember whether you have traveled any of the trains where the Pullman car was in charge of a Pullman conductor—I mean—a Pullman porter, and no Pullman conductor on that train.

A. Yes, sir.

Q. You have been a Pullman passenger under those circumstances?

A. Yes, sir.

Q. Have you noticed any difference in the service that is [fol. 239] rendered to the passengers on that type of train from that that is rendered to passengers on a train where a Pullman conductor is present?

A. No, sir.

Q. Mr. Fisk would you have any hesitancy about placing female members of your family on a Pullman car of that kind in charge of a Pullman porter?

A. No, sir.

Q. Where there is no Pullman conductor on the train?

A. No, sir.

Q. Have you ever observed any mistreatment of passengers on that kind of a train?

A. No, sir.

Q. That is all.

Cross-examination.

# Questions by Mr. Lewis:

Q. Have you ever observed any attempts at misconduct between any of the passengers on any of those cars?

A. No, sir.

Q. Have you ever observed any misconduct on the part of a passenger on any such cars, just individual passengers?

A. No, sir.

Q. Disturbing the peace, or getting drunk, anything of that nature?

A. No, sir, I haven't.

Q. In the event of any such disturbance or misconduct, do you think that a negro porter could do just as good a job [fol. 240] of straightening it out as a Pullman conductor?

A. I believe so, in my opinion, yes.

Q. You think he could? That is all.

Mr. Graves: That is all. Thank you, Mr. Fisk.

(Witness excused.)

STANLEY MARSH, JR., a witness produced by the Plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. You live in Amarillo?

A. Yes, sir.

Q. Your name is Stanley Marsh, Jr.?

A. Yes, sir.

Q. What is your business?

A. I am in the gas production business.

Q. Have you had occasion to trave! on the trains frequently in recent years?

A. I judge that I travel about once a month, on the aver-

age, on the trains.

Q. Have you traveled on trains where the Pullman car was in charge of a porter, and where there was no Pullman conductor on the train?

A. Yes, sir.

Q. As a Pullman passenger?

[fol. 241] A. Yes, sir.

Q. Have you noticed any difference in the service rendered to the Pullman passengers on that type of train from the service on the trains where the Pullman conductor was present?

A. In many cases I didn't even know whether there was a conductor there. I didn't distinguish any difference in

the service.

Q. Have you seen any mistreatment of passengers, either by passengers or by the Pullman porter on such occasions?

A. No, sir. Q. That is all.

Cross-examination.

Questions by Mr. Lewis:

Q. Mr. Marsh, how long have you lived in Amarillo? A. 13 years.

- Q. You say in most instances you hadn't noticed the difference?
  - A. No, sir.

Q. What caused you to observe the fact that there were not conductors in some instances?

A. I had simply heard that certain trains were porter in charge trains, and I have noticed it after I heard it.

Q. Who told you about that?

A. In distinguishing between where there are conductors and where there are not, I have asked some of the lawyers connected with this case where those cases exist, to refresh my memory, on where those runs were.

[fol. 242] Q. And do you have any independent recollection of any of the different runs prior to the time these gentlemen spoke to you about it?

A. I do on the run from Amarillo to Oklahoma City, on the Rock Island.

Q. What caused you to remember the difference?

A. I simply remembered back that there was no conductor. That is the way I would like to explain it.

Q. What caused you to notice it?

A. At that time I didn't notice the difference. I now remember it.

Q. Did you inquire for a conductor?

A. No, sir.

Q. Did you ever inquire for one?

A. No, sir.

Q. Where do you get your passage, before you get on the train?

A. Yes, sir.

Q. Always?

A. Yes, sir.

Q. Did you ever notice any disturbance on the train?

· A. Up in Oklahoma I saw one drunken man, is all I remember.

Q. Did you ever notice any attempt at misconduct on the part of passengers in the sleeping cars?

A. No, sir.

Q. You never have seen them?

A. No. sir.

[fol. 243] Q. You think that the porter could do as good a job of straightening that out, if there were any misconduct, as a conductor?

A. I will admit that if there were bad misconduct, I would rather there were ten people-

Judge McMillan: Rather there were what?

A. Ten people there to straighten it out, if my family were on the train.

\*Q. If there were just some misconduct, you would rather it would be a white man?

A. No, as a practical matter, I believe the porter can handle it.

Q. That is all.

Redirect examination.

#### Questions by Mr. Graves:

Q. He asked you whether you got your passage before you got on the train. You don't travel on passes. You mean you got your ticket?

A. My ticket.

Q. That is all, thank you very much.

(Witness excused.)

[fol. 244] L. M. Shepardson, a witness for the plaintiffs, having been previously duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. Please state your name.

A. L. M. Shepardson.

Q. You live at Waco?

A. Yes, sir.

Q. How long have you lived at Waco?

A. Thirteen years.

Q. What is your business?

A. I am traffic manager of the Waco Chamber of Commerce.

Q. Have you had occasion to travel frequently on the trains as a Pullman passenger in recent years?

A. Many, many times every year.

Q. Have you traveled frequently on Pullman cars that were in charge of a Pullman porter, where no Pullman conductor was present in charge of the car?

A. Yes, sir, many times.

Q. Have you noticed any difference in the service rendered to the passengers on those trains as compared with one where the Pullman conductor is present?

A. None whatever.

Q. Would you have any hesitancy whatever in allowing your female members of your family to ride on Pullman

cars in charge of porters?

[fol. 245] A. No, sir, they do it many times, and if I may be permitted to elaborate, when my wife or any of the female relatives are traveling to and from, I nearly always call upon the porter to see that they get special attention, and it is nearly always rendered.

Q. Have you ever noticed any disturbances or mistreatment of passengers on the Pullman cars where they were in

charge of porters?

A. No, sir. I have traveled for a great many years, and I have never seen a passenger mistreated yet.

#### Cross-examination,

## Questions by Mr. Lewis:

Q. Does the presence of the train conductor on that train have any bearing on the way you feel about it?

A. The presence of the train conductor?

Q. Yes, sir.

A. The train conductor is in charge of the train, and naturally if there should be any disturbance the porter could call on him, but I have never found any occasion for anything of that kind to happen.

Q. Does that have any bearing on the way you feel about

the question?

A. No, not particularly. This question seems to be as to whether the passenger is safe with a Pullman porter, as safe with a Pullman porter as he is with a Pullman conductor, and I say he is. That has been my observation.

Q. You have never noticed any disturbances on any of

the trains?

[fol. 246] A. Nothing that would be outstanding at all, no. Nothing that I can lay my finger on particularly.

Q. Do you remember any instance where a man had to

correct a passenger?

A. No, I don't believe I do. I don't believe I have noticed any case of that kind. I have noticed instances, if you want

to elaborate, where Pullman conductors have got very officious and have gone beyond their duties, and I have never seen that on the part of a Pullman porter.

Q. How many times have you noticed that?

A. Well, I know of one particular instance that affected me that way. That was some time ago.

Q. You are just a little "agin" them, is that it?

A. No, sir, not in the least. I have occasion to charter trains two or three times nearly every year, with both Pullman porters and Pullman conductors on them. I have a great many friends all over the United States among the Pullman porters and Pullman conductors. Several in the audience.

(Witness excused.)

A. G. Boldridge, a witness for the plaintiffs, was sworn and testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. Your name is A. G. Boldridge?

A. Yes, sir.

[fol. 247] Q. Are you employed by the Pullman Company?

A. Yes.

Q. In what capacity?

A. Agent at Shreveport right now.

Q. How long have you been in the employ of the Pullman Company?

A. Slightly over seventeen years.

Q. Have you ever worked for the Pullman Company in Texas?

A. Yes, sir, most of my time has been in Texas, practically all of it.

Q. In what capacity?

A. Up until December 11th when I moved to Shreveport I was in Texas altogether. I have been conductor, day agent, night agent, agent at Galveston, conductor again, and service inspector. Now agent at at Galveston.

Q. Now agent at Shreveport, you mean?

A. I mean Shreveport. Pardon me.

Q. How long have you served as inspector in Texas?

A. Almost three years.

Q. That was work that required you to travel with the trains constantly?

A. Yes, practically all the time.

Q. What was the purpose of the traveling that you did?

A. To inspect all of the cars and employees en route, supervision in general at outlying points.

Q. Well, did you-were you required as a traveling in-

spector to make reports?

A. Yes.

[fol. 248] Q. To the company?

A. Yes.

Q. Did the reports cover the work of the conductors as well as the work of the porters?

A. Yes, it covered it all.

- Q. I will ask you to state how the service was, as you found it, rendered by the porters in charge, compared with the service as you found it rendered by the Pullman conductors?
- A. Well, in practically every case I found that the cars were in tip-top condition where the porters were in charge, and a good many cases where the cars were not in good condition with conductors.

Q. Well, in general would you say that there is any difference between the complaints that you had to make as between the two kinds of service?

A. I don't believe I have had to make any complaints on porters operating in charge at all during nearly three years.

Q. Now, when you travel on these trains, when you traveled on these trains did the porter in charge or the conductor, as the case happened to be, have any warning that you were going to travel on that particular train?

A. Sometimes they do. They have a way of signaling sometimes. I always tried to make a point to get on the

trains where they wouldn't have that information.

Q. Where they wouldn't have that information?

A. Yes.

Q. You didn't give them any such warning then? [fol. 249] A. No.

Q. Among other things, is it your duty to determine whether either the conductor or the porter has been drinking while on duty?

A. Yes, sir, absolutely.

Q. Do you endeavor to detect liquor on his breath? In other words, do you endeavor to find out whether he was drinking before you got on the train?

A. Yes.

Q. Have you had occasion to make reports against porters in charge for that offense?

A. No.

Q. Have you also had occasion to inspect different runs for the purpose of making recommendations as to whether the run would be made a porter in charge run or conductor run?

A. Sometimes, yes.

Q. When you were operating as an inspector in Texas under what superintendents did you work?

A. The zone superintendent, whose office is in Houston.

Q. And who was the district superintendent?

A. Mr. W. H. Irwin.

Q. During the time that you were one of the traveling inspectors in Texas do you know how many inspectors the company had traveling the trains in the Texas territory?

A. Two including myself. Q. Two including yourself?

- A. And I understand there was one out of St. Louis came [fol. 250] down once in awhile.
- Q. Now, that was in addition to the traveling that is done by the district superintendents and their assistants?

A. Yes.

Q. By the way, Mr. Boldridge, are you a Southern man? A. Yes, sir, I was born in Lancaster, South Carolina.

(Witness excused.)

W. H. Irwin, a witness for the plaintiffs, was sworn and testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is W. H. Irwin?

A. Yes, sir.

Q. What is your position with the Pullman Company?

A. District superintendent of the Pullman Company at Houston, Texas.

Q. How long have you been in the employ of the Pullman Company?

A. Twenty-eight years.

• Q. How long as district superintendent?

A. A year.

Q. You have been at Houston a year?

A. I have been in Houston twenty years, but I was in Houston as chief clerk, second assistant superintendent and assistant superintendent, first assistant superintendent and district superintendent.

Q. You succeeded Mr. Cease there?
[fol. 251] A. I was made a district superintendent, but we have an assistant to the vice-president.

Q. I see.

A. That has charge of the Houston zone.

Q. Mr. Irwin, did you have any particular duties to perform in behalf of the Pullman Company in respect to the employment of Pullman porters, or rather applicants for

the job of Pullman porters?

- A. Yes, sir, I did all of the work of handling of applications and approving of the applications. That is, if we were going to take up any porters, the first thing we would bring the man in that was going to make the application and if he filled the bill he would make application. We would cover his time for the last five years, there wouldn't be any lapse for five years as to where he had worked, in addition to three references from three people whom he had worked for, and in addition to that I would go out and personally interview the men he worked for, as well as personal references, and after that I or the porter instructor would go out where this porter lived, this colored man lived, and check up his home surroundings and see whether or not he would be a suitable man for our service. And then after we had the application completed then, of course, the district superintendent would approve the application and send it to the zone superintendent for approval.
- Q. Now, what other Pullman employees are engaged in the state of Texas riding the trains and supervising the [fol. 252] service other than the traveling inspectors, service inspectors and superintendents?

A. The district superintendent and the assistants.

Q. Does the Pullman Company have any other employees operating out of the district offices other than the porters and conductors? Do you have any yard men?

A. Yes, we have yard inspectors. We have a yard inspec-

tor assigned to the Houston zone.

Q. Do you, have any safety men?

A. We have a safety supervisor also.

Q. Do you have any passenger travel men?

A. We have a passenger travel agent now assigned to the Houston zone.

Q. Now, do all those men occasionally ride the trains?

· A. They are out on the road practically all of the time.

Q. Are they supervising the service while they are on the trains?

A. Yes, sir, and they make reports just like a service

inspector would, if they found anything wrong.

Q. If any complaints are made from any source of the conduct or the dereliction of duty on the part of the porter in charge in your district would the complaints come under your notice?

A. Yes.

Q. Would they come to your office?

A. They would come to my office, yes, sir.

Q. I will ask you to state how many complaints you have [fol. 253] had of that nature?

A. I don't recall any, any serious complaints. Of course, there might be some service complaint, the porter may have failed to explain the operation of the lower berth ventilation to a passenger, but as far as any serious complaints, I don't know of any.

Q. Speaking particularly with reference to porters in charge.

A. Porters in charge, yes, sir.

Q. Do you ever attend any of these meetings, instruction

meetings or schools, as you call it?

A. I conduct the schools in the Houston district. I conduct the schools. We have quarterly service and safety meetings and the conductors, we usually start the conductors at 8:45 in the morning until about 10:00 a.m., and then the porters from about 10:30 to about 12:00 o'clock, and both the conductors and the porters receive the same instructions, and after the meetings are over we furnish each and every employee with a resume of just what has been covered in the service and safety meetings.

Q. Do the Pullman conductors get any instructions or schoolings that the porters in charge do not get?

A. No sir.

# Cross-examination.

### Questions by Mr. Morgan:

Q. Do you have any qualifications at all for Pullman conductors?

A. Yes, sir, the same qualifications. We would handle it the same way we handled the porter. We would check up [fol. 254] on his application the same.

Q. Do you have any book of instructions for porters in

A. Porters in charge use the same book as the conductors.

Q. You don't have any special instructions for them, do you?

A. No special instructions, just the same instructions the conductors get.

Q. How long would it take a traveling inspector to cover all the lines? I believe you say you have about 400 cars in Texas. How long would it take to cover all of the lines in Texas, just on one trip?

A. Well, don't figure just the inspectors, because all of the district representatives and their assistants are out all the time, and all these lines are covered at least once a month by some member of the staff in the zone.

Q. All right, can you please answer my question, how long it would take for one man to cover it all?

Judge Sibley: Why should he answer it if one man doesn't

• Mr. Morgan: I understood, if the Court please, that he testified he had two inspectors in the state.

Judge Sibley: He says he has a staff, seven or eight or nine, as I recall it.

A. Yes, your Honor. We all, all the district superintendents, the superintendent, the safety supervisor and the yard inspector and everyone else are instructed when they go out on trains to inspect the service and make reports.

Q. Well, then, some member of that staff that you referto, I believe you say, gets around at least once a month? [fol. 255] A. Yes, sir.

Q. And that is about as often as you can cover it, isn't it?

A. Lots of times we have men out there. We cover it regularly, you understand. There are sometimes five or

six cars in one train, and a man can cover maybe twenty or thirty cars a day.

Redirect examination.

# Questions by Mr. Graves:

Q. The service inspectors, do they travel the entire trip

every time, or do they get on and get off?

A. They get on and get off, possibly they will ride a train maybe fifty miles and get off and get on another train, and they might cover eight or ten trains a day by making these jumps.

Q. Do they cover a number of trains at night also?

A. They are on the trains at day and night, and of course they get on at stations where the employees least suspect them to get on. We have them do that so we can find out just what the service is. Many times a man will get on at midnight or two o'clock in the morning and he might go to a meeting point of a train and get off and get on another train at two-thirty in the morning.

Q. Do you-have an agent at the platform at the station in Houston every time a train goes out of the Houston

station?

A. We have two men, one at the Union Station and one at the Southern Pacific, and they cover every train to see the employees are in first class shape and to see that the [fol. 256] cars are in first class shape, and also they cover every passing train, every train that passes. We don't permit any train to get out without an employee being there, myself or a platform representative or some member of my office seeing that train before it leaves, to see that it is in first class shape as to employees and equipment.

(Witness excused.)

F. B. VALET, a witness for the plaintiffs, was sworn and testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is F. B. Valet?

A. Yes, sir.

Q. You are district superintendent of the Pullman Company, stationed at Dallas?

A. Yes, sir.

Q. How long have you been with the Pullman Company?

A. I am in my thirtieth year.

Q. What different positions have you filled?

- A. Well, I have filled the positions of clerk, stenographer, receiving cashier, ticket agent, agent and district superintendent.
- Q. How long have you been district superintendent at Dallas?

A. Since last December.

Q. Do you hold service meetings at the Dallas office?

A. We do.

[fol. 257] Q. Are those meetings held jointly, that is, do the porters and conductors hold joint meetings or attend separate meetings?

A. I have held joint meetings, but I haven't held any

in Dallas as yet. I have only been there two months.

Q. Have you had occasion to form an opinion as to the comparative service, quality of service rendered in general by the porters in charge to that of the service rendered by that of Pullman conductors?

A. I have found it to be equally satisfactory.

Q. Where were you stationed before you went to Dallas? A. Shreveport.

Q. Shreveport?

A. Yes, sir.

Q. How long were you there?

A. Twenty years.

Q. Well, did any of these porter in charge lines that are involved in this suit operate through or but of Shreve-port?

A. I think the Kansas City Southern was mentioned.

That line operated out of Shreveport.

Q. The Kansas City Southern line from Shreveport to Kansas City is one of the lines involved here.

A. Yes, sir.

Q. That line did operate out of Shreveport, out of the Shreveport office?

A. Yes, sir.

Q. Did you ever have any complaints while you were there of the conduct or dereliction of duty on the part [fol. 258] of the porters in charge on that line?

A. Minor derelictions. Not particularly porters in charge. We have reports of minor derelictions of employees in the lines at different times.

Judge McMillan: You say that this service rendered by a porter in charge on one car is just as good as if he had a conductor?

A. I think so.

Judge McMillan: When does it become desirable to have a conductor?

A. Well, when you have several cars where each porter would have to look after his own car.

Q. Each porter can attend to his car just as well without a conductor as he can with one, and on a train made up of eight or nine cars each porter would attend to his own car?

A. Yes, sir. There are other things that enter into that.

Judge McMillan: What are they?

A. Assignment of space.

Judge McMillan: You mean shifting space between cars?
A. Yes, sir.

Judge McMillan: Anything else?

A. I can think of nothing else.

- Q. Is it of any importance to the company that you have one man on the train that knows about the space on the entire train?
  - A. Well, where there are severals cars it would be.

Q. That is what I am talking about.

A. Yes.

[fol. 259] Q. As a rule on these longer trains made up of several Pullman cars is the traffic heavier?

A. It is.

Cross-examination.

Questions by Mr. Morgan:

Q. Would it be difficult for porters to interchange that information you have just spoken of?

A. Would it be difficult?

Q. Yes, sir. They are just there from one car to another, aren't they?

A. It probably would if there are a number of cars involved, the space would have to be transferred back and forth, the assignment rather.

(Witness excused.)

ALLEN HARVEY, a witness for the plaintiffs, having been previously duly sworn, testified as follows:

Direct examination.

#### Questions by Mr. Graves:

Q. You are one of the parties to this suit, are you, Allen?

A. Yes, sir.

Q. Allen Harvey is your name?

A. Yes, sir.

Q. Where do you live?

[fol. 260] A. Fort Worth.

Q. How long have you lived at Fort Worth?

A. About thirty-seven years.

Q. Thirty-seven years?

A. Yes, sir.

- Q. How long have you been working for the Pullman Company?
  - A. About thirty years.
  - Q. About thirty years?

A. Yes, sir.

Q. As porter all of that time?

A. Yes, sir, porter.

Q. Where were you born?

- A. I was born in Colorado County, between Houston and San Antonio, on the main line of the Southern Pacific, Weimar.
  - Q. Weimar?

A. Yes, sir.

Q. You have lived in Texas practically all your life?

A. Yes, sir, all my life.

Q. Are you a married man?

A. Yes, sir.

Q. Have you got a family?

A. Yes, sir.

Q. What does your family consist of?

A. A wife and a daughter.

Q. Your wife and daughter?

A. Yes, sir.

Q. How much schooling have you had? [fol. 261] A. I went through high school and about three years in college.

Q. About three years in college?

A. Yes, sir.

Q. What college?

A. Paul Quinn College, Waco.

Q. Is your daughter educated?

A. Yes, sir.

Q. Did she finish high school?

A. Yes, sir. She has her Master's.

Mr. Morgan: We submit that is not material. Judge Sibley: Sustain the objection.

Q. Do you own your home?

A. Yes, sir.

Q. Is it paid for?

A. Yes, sir.

Q. Do you own any other property?

A. Yes, sir, I have a little more property.

Q. You have a little more property?

A. Yes, sir.

Q. Some rent houses?

A. Yes, sir.

Mr. Morgan: We object to that.

Judge Sibley: He is answerable personally in damages if he does anything wrong. Out that as short as you can. You can show he is a responsible man, I think.

Mr. Graves: Yes, sir.

Q. Allen, what line are you now operating on as porter? [fol. 262] A. 3128.

Q. 3128?

A. Fort Worth-

Q. Where do you start and where do you end?

A. I start at Fort Worth to Ennis. I open my diagram, that is, start to open it on leaving Fort Worth as far as Ennis. I am in charge coming back. I close the diagram coming into Fort Worth.

Q. All right, now, that is on the Southern Pacific?

A. Yes, sir.

Q. A train leaving Fort Worth at night for Houston?

A. Yes, sir, 10:35.

Q. And it is a branch that runs out of Fort Worth and connects with the main line at Ennis?

A. Yes, sir.

Q. And that main line starts at Dallas?

A. Yes, sir.

- Q. And there your car is hooked onto a train that has a Pullman conductor on it?
  - A. Yes, sir.
  - Q. What time does your train leave Fort Worth?
  - A. 10:35.
  - Q. What time do you leave Ennis?
  - A. Coming back?
  - Q. Going to Houston?
  - A. At 12:30.
  - Q. At 12:30?
  - A. Yes, sir.

[fol. 263] Q. Midnight?

- A. Midnight, A. M., yes, sir.
- Q. On an average, how many passengers do you haul on that car?
- A. Well, just take on an average, it will average from five to six and sometimes not that many. Just say on an average, on an average about five or six.
- Q. Are nearly all of them through passengers from Fort Worth to Houston?
- A. Yes, sir, néarly all of them are through passengers. Very seldom do we have any shorts.
  - Q. How long have you been running on that line?
- A. Oh, I have been over on the Southern Pacific about seven or eight years, on the Southern Pacific, in charge.
- Q. Have you been in charge of that car all the time from Fort Worth to Ennis?
  - A. Yes, sir, all that time.
  - Q. Have you had any other porter in charge operations?
  - A. Oh, yes, sir.
  - Q. Tell us about some of them.
  - A. Well, I ran between Tulsa and Kansas City in charge.
  - Q. From Kansas City-
  - A. When they had the sur-charge on.
  - Q. When they had the sur-charge on?
- A. Yes, sir. That was before they taken it off. I run between there.
  - Q. Between where?
  - A. Tulsa and Kansas City.
  - Q. Between Tulsa and Kansas City?
- [fol. 264] A. Yes, sir, about 263 miles, I think it is.
  - Q. How long were you on that run?
  - A. Oh, I was there about, I think about a couple of years.

Q. Are there any others?

A. Well, on the Katy between Muskogee and Tulsa.

Q. Muskogee and where?

A. Tulsa.

Q. Tulsa?

A. Yes, sir, on the Katy.

Q. Any others?

A. Yes, sir, on the Frisco between Fort Worth and Tulsa.

I had that line, too.

Q. That was an in charge line?

A. Yes, sir, that was in charge as far as Sherman.

Q. Well, have you ever run on any other Texas lines in charge?

A. No, sir.

· Q. Did you ever run out to Abilene?

A. I ran out there about ten years. Of course, I handled all the transportation, but I didn't make a diagram at that time, but I handled it all just the same as in charge. I didn't get a conductor until 12:35 at night.

Q. Going which way?

A. Going east.

Q. Going east?

A. Yes, sir, going to Fort Worth.

Q. That car operated from where?

A. From Fort Worth to Abilene and set out.

Q. Set out at Abilene?

[fol. 265] A. Yes, sir.

Q. What time did you get to Abilehe?

A. Got there at 3:20 in the morning.

Q. Well, did it have a conductor on it from 3:20 until 8:00 o'clock in the morning?

A. No, sir, the conductor went on to El Paso.

Q. You were in charge of the car?

A. Yes, sir.

Q. From 3:20 in the morning?

A. Until we discharged passengers at 7:30. You might say 7:30, because they had until 7:30 to occupy the car, you see.

Q. How long did you say you ran on that line?

A. About ten years on the T-P out west.

Q. Are you pretty well acquainted with the Abilene People?

A. Yes, sir, I was well acquainted with them.

Q. Allen, have you ever had a fight with a passenger on the train?

A. No, sir.

Q. Have you ever had any trouble of any kind?

A. No, sir, never had any trouble, no, sir.

Q. Have you ever had an experience with a drung passengers on the train?

A. Well, I have seen them drinking, but I have never had no trouble, never did have no serious trouble, no, sir.

Q. Have you ever had an experience with a drunk passen-

ger that you couldn't handle by yourself?

A. No, sir, I never did. I have always pacified them and [fol. 266] got them to bed or got them quiet some way or another, you know.

Q. Well, how do you go about handling that? Do you

order them around? .

A. Oh, no, sir, you couldn't do that, you know.

Q. What?

A. You couldn't do that and get no where with that, Judge, no, sir. You have to handle them with gloves. Even if you had a conductor he couldn't do that, just order them around, because it wouldn't go. You would sure have trouble then.

Q. Have you ever had any experience on the train where a drunk passenger insulted another pasenger?

A. No, sir, I never have, no, sir.

Q. Either on the train where you were in charge of the Pullman car or where there was a conductor?

A. No, sir, neither one.

Q. What are your instructions from the Pullman Company if you have any—if a passenger on the train that was unruly whom you can't pacify, what are your instructions?

A. Well, my instructions are to go and get the train

conductor.

Q. Get the train conductor?

A. Report it to the train conductor, yes, sir.

Q. What would you do?

A. Yes, sir, that is what I would do.

Q. The porter in charge runs have been one car operations, I take it, where you have been in charge?

A. Yes, sir, just one car.

. Q. Just one car?

[fol. 267] A. Yes, sir.

- Q. Do you get extra pay from the Pullman Company for being a porter in charge?
  - A. Yes, sir.
  - Q. How much?
  - A. \$13.50 a month.
  - Q. \$13.50 a month?
  - A. Yes, sir.
  - Q. What is your age?
  - A. My age is fifty-nine.
  - Q. You are fifty-nine years old?
  - A. Yes, sir.
- Q. At what age will you be entitled to retire if you should want to retire?
  - A. Supposed to be sixty-five, thirty years in service.
  - Q. Have you ever had any trouble making change?
  - A. No, sir.
  - Q. For passengers on the train?
  - A. No, sir, I have never had no trouble.
  - Q. Have you ever had any trouble with your diagram?
- A. No, sir. No, sir, I knock on wood. I never had one sent back to me, and you know if you make a mistake with the Pullman Company they will sure send it back.
  - Q. You never had a diagram to come back on you?
  - A. No, sir, I never had one to come back on me.
  - Q. If you make a mistake on it that is what would happen?
- A. Yes, sir; oh, yes, sir, that is what would happen, if just a penny was involved you will get it back.
- [fol. 268] Q. Are you a member of the church?
  - A. Yes, sir.
  - Q. What church do you belong to?
  - A. The Methodist.
  - Q. What church?
  - A. A. M. E. Methodist.
  - Q. At Fort Worth?
  - A. Yes, sir. I went to church yesterday morning here.
  - Q. You went to church here yesterday morning?
  - A. Yes, sir.
  - Q. Do you drink?
  - A. No, sir.
  - Q. Have you ever been guilty of being drunk on duty?
  - A. No, sir; no, sir, I have never had no trouble about that.

#### Cross-examination.

#### Questions by Mr. Lewis:

Q. Allen, about how often are you troubled with people

drinking on the cars?

A. Oh, I haven't had any trouble, just say drinking on the cars, I can't recall the day when I have had any. I haven't had no trouble at all. I have had them drinking, but no trouble, no, sir.

Q. What does it take to be trouble?

A. Well, somebody that is interfering or wants to fight or disturbing other passengers, that is what I would call trouble.

Q. How long has it been since you asked a man to be quiet

[fol. 269] or to change his conduct in any way?

A. Well, to change his conduct—well, I have had them probably in the smoker would get a little loud. They would be bothering nobody, but among themselves, three or four men, they would be a little loud, talking, and the way I would get that quiet is I would go in and ring a false bell myself and I would say, "That man say he can't sleep," and that is the way I would work that.

Q. Have you ever reported any of those to the Pullman Company, any misconduct at all?

A. No, sir, I have never had to report nothing.

Q. You have never had any kind of a report on any misconduct to make to the company?

A. No, sir.

Q. Have you ever had to call on the train conductor for assistance?

A. No, sir, never, I have not since I have been in charge. Never have I had to call on them.

Q. The rest of the porters that act as conductors, have you ever heard of any of them having any trouble?

A. No, sir, I never did.

Q. There just wasn't any?

A. No, sir.

Q. Have you ever noticed any attempted misconduct between men and women on the trains?

A. No, sir, I never have, because there are very few lady passengers I haul. I don't haul many.

[fol. 270] Q. Do you ever have any colored passengers on the Pullman?

A. No, sir, I have never hauled any since I have been in the Pullman service, thirty years.

Q. How many porters are there on each car?

A. On which one? You mean on the car that I am on?

Q. Yes, when you are operating, when you are a porter on a Pullman car, how many porters are operating that car?

A. Just me. I am the onliest porter on the car.

Q. And that is true whether there is a conductor there or not?

A, If the conductor is there there is just one porter on a car, if the conductor is there, yes, sir.

Q. Have you ever handled a Pullman car with yourself in

charge where there is more than one of such cars?

A. Yes, sir, I have had a car. Not at a starting point. I have had a car that had a conductor and was cut off, like say a car from Houston to Fort Worth and cut off at Ennis, but we had a conductor as far as Ennis. It is about fifty-five miles from Ennis to Fort Worth, and he would go in with the other car, you know, but of course everything had been checked up, you understand.

Q. Is that regularly that you have that?

A. No. No, sir, I haven't had that in over a year, it has been over a year since I have had that. Just once in awhile when there is an extra car that is put in line or something like that, yes, sir.

# [fol. 271] Redirect examination.

## Questions by Mr. Graves:

Q. Who handles the drunk passengers on the Pullman

car when the Pullman conductor is there?

A. Well, if he can't do anything with them he has to go get the train conductor, the same as I would. I have seen them have to go get them for different occasions. That is about tickets or something, something concerned with a ticket. He just goes and gets the train conductor.

Q. Do they ever call on you to belp them with drunk pas-

sengers?

A. Who?
Q. The Pullman conductors?

A. No, sir, he don't call on me, because if I have one on there I try to assist and do as much as I can without him telling me, yes, sir. Q. Now, on this train that you are operating on now, where does the brakeman, the train brakeman, ride?

A. He rides on that car, the rear car, the same car I am on. The rear going and coming.

Q. Is that the rear on the train?

A. Yes, sir.

Q. Both ways?

A. Yes, sir, both ways.

Judge Sibley: That is generally true when you have a one car Pullman, isn't it?

A. Yes, sir, with one car, but leaving Houston I am the rear car, see, where there are four cars on the train, regular [fol. 272] cars on the train leaving Houston going north, and when we come into the train at Ennis they come from Dallas, the regular line, regular line cars. I hook on behind them. I am still the rear car. I am the rear car going both ways unless they have something behind me, a deadhead or something like that that is not in service, but as a general thing I am the rear car.

Q. Then does the brakeman ride in that car going both ways?

A. Yes, sir, both ways.

Q. Does the train conductor come through the car between Fort Worth and Ennis?

A. Oh, yes, sir, sure; yes sir, he comes back. Yes, sir, maybe two or three different times before I get to Ennis.

Q. Is that true going both ways?

A. Yes, sir, both ways.

· (Witness excused.)

(At this time, 12:00 o'clock noon, Monday, February 19, 1940, a recess was taken in this case until 2:00 o'clock p. m., of the same day, at which time the following proceedings were had:)

[fol. 273]

Monday, February 19, 1940.

Afternoon Session: 2:00 P. M.

Judge Sibley: Call your next witness, please.

Mr. Graves: I will ask West and McBay to come around, so that they will be near the stand.

F. H. McBay, a witness for plaintiff, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is F. H. McBay?

A. Yes, sir.

Mr. Graves: Your Honor, this is an intervener plaintiff. Judge Sibley: All right.

Q. You live at Fort Worth?

A. Yes, sir.

Q. How long have you lived at Fort Worth?

A. Twenty-five years.

Q. You are a Pullman porter?

A. Yes, sir.

Q. How long have you been working for the Pullman Company?

A. Twenty years.

Q. Are you on one of the lines known as a porter in charge line?

[fol. 274] A. Yes, sir.

Q. Which line is that?

A. Number 3531.

Q. That runs from where to where?

A. From Fort Worth to St. Louis. The Pullman car runs to Little Rock—it stops at Little Rock.

Q. The Pullman car stops at Little Rock?

A. Yes, sir.

Q. Were you born in Texas?

A. Yes, sir.

Q. Where?

A. Mexia.

Q. Are you a married man?

A. Yes, sir.

Q. Do you have any family?

A. Yes, sir.

Q. Do you have a wife and children?

A. I have a wife, a girl, and a boy.

Q. Any grandchildren?

A. One, yes, sir.

Q. One, you say?

A. Yes, sir.

- Q. Do you belong to the church?
- A. Yes, sir.
- Q. What church?
- A. Allen Chapel Methodist Church at Fort Worth.
- Q. Do you drink?
- A. No, sir.

[fol. 275] Q. How long have you been operating as a porter in charge?.

- A. About four years.
- Q. Have you been on this same line four years?
- A. No, sir; I was over on the line to Houston for a while; and the line from Fort Worth on the Katy to Denison a while.
- Q. That is three different porter in charge runs that you have had?
  - A. Yes, sir.
  - Q. Now, that is on the Texas Pacific, is it?
  - A. Yes, sir; Texas Pacific and Missouri Pacific.
- Q. Combination of Texas Pacific and Missouri Pacific trains?
  - A. Yes, sir.
  - Q. The car leaves Fort Worth at what time?
  - A. 8:45.
  - Q. At night?
  - A. Yes, sir.
  - Q. And when are you put in charge of the car?
  - A. At Marshall.
  - Q. At Marshall, Texas?
  - A. Yes, sir.
  - Q. You/are in charge from there until where?
  - A. To Little Rock.
  - Q. Little Rock, Arkansas†
  - A. Yes, sir.
  - Q. And the car goes ahead from there to Memphis?
  - A. Yes, sir.
- Q: And coming back you are in charge from where? [fol. 276] A. Coming back, we have a conductor all the
- Q. You operate, do you, from Memphis back to Fort Worth?
  - A. Yes, sir.
- Q. What time does your car going north or east arrive at Marshall?
  - A. We get in there about 2:20 in the morning.

Q. And what time does it arrive at Texarkana?

A. 4:10 in the morning.

Q. So in the part of the run that is in Texas, you are in charge from Marshall to Texarkana?

A. Yes, sir.

Q. From 2:00 o'clock in the monring to 4:00 o'clock in

the morning?

- A. Well, I am in charge from Marshall to 8:10 in the morning. The car arrives at destination at 8:10 in the morning.
  - Q. That is at Little Rock?

A. Yes, sir.

Q. Yes; but the part in the State of Texas.

A. At 4:10 in the morning.

Q. Have you ever had any serious trouble of any kind with any passengers?

A. No, sir.

Q. Have you ever had a row, dispute, or fight with passengers on the train?

A. No, sir; never have.

Q. Have you ever had any trouble with drunk passengers?

A. No, sir; I have not. I have had drunk passengers on [fol. 277] the car, but I have never had any trouble with them.

Q. How do you go about handling a drunk passenger?

A. If a man is drunk on the car, the first thing I try to do is to get him to bed. If you can get him to bed pretty soon, he will go to sleep.

Q. Do you give him any instructions or orders?

A. No, sir, I don't give him any orders; I just coax him along. I give him service and try to get him to bed. If you can get him to bed, he is not into trouble.

Q. What are your instructions in case you should have a passenger on your car that you could not handle?

A. I would first notify the train conductor.

Q. Do you remember having had to do that on any occasion when you have been in charge?

A. No, sir; I have never had it to do.

Q. What does the Pullman conductor do, when he has trouble of that kind, if he is on the train?

A. He would notify the train conductor.

Q. You get how much extra pay per month for the service that you are now connected with—the porter in charge run?

A. \$13.50 a month.

Q. That is a porter in charge run in one direction, but it is not a porter in charge in the other direction?

A. Both ways. You get paid for it the round trip.

Q. You get paid just the same for a full porter in charge run?

A. Yes, sir.

[fol. 278] Q. \$13.50 a month?

A. Yes, sir.

Q. Do you own your home?

A. Yes, sir.

Q. Is it paid for?

A. No, sir; I owe \$300 on it.

Q. To whom?

A. The Fort Worth Building and Loan Association.

Q. How do you pay it out—quarterly, monthly, yearly, or how?

A. I have paid the first of every month.

Q. How much is that?

A. \$13.50 a month.

Mr. Morgan: We object to that.

Judge Sibley: The objection is sustained.

Mr. Graves: Does the Court rule out this last answer?

Judge Sibley: 'Yes, sir. I don't see the necessity of going into that. He is just trying to buy his home.

Q. How much education have you had?

A. High school and one year in college.

Q. Have you had any trouble of any kind?

A. No, sir; never in my life.

Q. Ever let a passenger make you mad?

A. No, sir.

Q. Suppose a passenger were to abuse you?

A. Well, that is my job; I am supposed to take it. I am [fol. 279] not supposed to get angry.

Judge Allred: You mean if you get angry, you don't let him know anything about it?

A. I am not so easily made angry.

Q. This car on this porter in charge run from Marshall to Little Rock is placed where in the train?

A. In the rear of the train.

Q. That is the rear car in the train?

A. Yes, sir; it is the only Pullman car on the train.

Q. Where does the brakeman ride on the train, as a rule?

A. On the rear.

Q. How many cars are there—passenger carrying cars in

the entire train during that part of the run?

A. There is one chair car; and down to Marshall we have a New Orleans sleeper, and that makes two sleepers; but after they cut loose from me we have one sleeper, and we pick up a diner at Little Rock, and that makes one chair car, a diner, and a Pullman.

Q. Between Marshall and Little Rock what do you have?

A. One chair car and this sleeper.

Q. And the Pullman?

A. Yes, sir.

Q. Does the conductor ever come back in your car?

A. Very often, yes, sir.

Mr. Graves: That is all.

#### Cross-examination.

## Questions by Mr. Lewis:

Q. Have you ever had an occasion to call the conductor to help you?

A. No. sir.

[fol. 280] Q. This is, the train conductor.

A. No, sir.

Q. Have you ever had occasion to call on the Pullman conductor to help you in any difficulty with passengers?

A. No, sir; I have never had occasion to call on any of

them.

Q. Does the Pullman conductor ever have anything to do with disorderly passengers?

A. You mean like a drunk man or something like that?

Q. Yes.

A. The porter has that mostly to do. It is the job he has

to worry with.

Q. Did you ever discuss that any with the Pullman conductor?

A. No, sir.

Q. Have you ever seen a Pullman conductor remonstrate with a man that was disorderly, or anything like that?

A. No; sir.

Q. You have never seen a Pullman conductor engage in anything of that nature?

A. No, sir.

Q. You have always done that yourself?

A. Well, I have had drunk men, but I just go ahead and get him to bed myself.

Q. Do you have drunk men to put to bed very frequently?

A. No, sir; just now and then; not often.

Q. Do any of them abuse you?

A. They raise sand sometimes, of course, but I manage to get them to bed and never disturb anybody. Maybe, they are in the smoker, and I let them stay there until they get sleepy, and then I get them to bed.

[fol. 281] Q. Do you ever notice any other misconduct be-

tween passengers or by passengers?

A. No, sir.

Q. Never seen any?

A. No, sir.

Q. What does the Pullman conductor do on the train?

A. His job is to sell space, take up tickets, and wire space.

Q. When he is not there, do you do it?

A. Yes, sir.

Q. Is that all he does?

A. He is over the Pullman car; it is his job to sell tickets and wire space,—

Q. Most of the time don't they have their tickets when

they get on the train?

A. Sometimes passengers have them, and sometimes they don't. You might pick up a man between points. Before he gets off, you might sell his space.

Q. What is the general rule, though, about tickets?

A. The general rule is get your tickets before leaving. I have had pasengers come down just in the pinch of time and buy space on the train.

Q. About how often will that happen?

A. I couldn't say how often it will happen, but it happens once in a while.

Q. Every week, or two weeks, or a month?

A. It will happen nearly every once in a while, somebody coming around.

Q. Without a Pullman ticket?

[fol. 282] A. Yes, sir.

Q. But as a general rule, they will have their Pullman tickets when they get on the train?

A. Yes, sir.

Q. Under those circumstances, does anybody have any trouble showing him which is his berth?

- A. No, sir, I have had no trouble showing him his berth when it is sold.
  - Q. That is already designated, is it?

A. Yes, sir.

Mr. Lewis: That is all.

Redirect examination.

Questions by Mr. Graves:

Q. Have you ever had any trouble making up diagrams? A. No, sir.

Mr. Graves: That is all.

(Witness excused.)

W. J. West, a witness called by the plaintiff, having been duly sworn, testified as follows:

Direct examination.

## Questions by Mr. Graves:

Q. Your name is W. J. West?

A. Yes, sir.

Q. You are a Pullman porter?

A. Yes, sir.

[fol. 283] Q. Where is your home?

- A. My present home now is in San Antonio, Texas.
- Q. How long have you lived in San Antonio?

A. Thirty-one years.

Q. Thirty-one years?

A. Yes, sir.

- Q. How long have you been working for the Pullman Company?
  - A. Twenty years the 20th of April this coming April.

Q. Are you a married man?

A. Yes, sir,

Q. You have a wife and children?

A. Yes, sir.

Q. Do you belong to the church?

A. Yes, sir.

Q. Where were you born?

A. Matonia, Texas.

Q. On what train are you regularly operating as a porter?

A. On M. K. T. train No. 4 and 3 between San Antonio and Kansas City. The car goes to Kansas City from San Antonio.

- Q. Do you go with the car from San Antonio to Kansas City?
  - A. Yes, sir.
  - Q. And back?
  - A. Yes, sir.
  - Q. Over what part of that trip is the porter in charge?
- A. He is in charge from San Antonio to Fort Worth going north, and from Waco, Texas, to San Antonio, Texas, coming back south.
- Q. Is that a daylight operation during the part of the trip [fol. 284] that the car is in charge of the porter?
  - A. It is daylight operation both ways in charge.
  - Q. Now, let's see-what time do you get to Fort Worth?
  - A. I get to Fort Worth at 9:45.
  - Q. At night?
  - A. At night, yes, sir.
  - Q. How long have you been on that run?
  - A. Nine months. ·
- Q. All of the passengers on that part of the run are seat passengers, are they?
  - A. Most o' them are seat passengers.
  - Q. Most of them are seat passengers?
  - A. Yes, sir.
- Q. Of course, you have some through passengers that have through space?
- A. Once in a while. We hardly ever have over one or two beds going through from San Antonio all the way through. Sometimes I may pick up a bed from Austin to Kansas City, but most times I just have seat passengers to Fort Worth and Dallas.
- Q. What is what these railroad men call the "consist" of this train? How many cars does that train have?
- A. That train has a Pullman car that starts at San Antonio; it has two day coaches, and I think one or two baggage cars, and a mail car.
  - Q. It has three cars that carry passengers?
  - A. Yes, sir.
- Q. Where does the brakeman ride in the train, as a rule? [fol. 285] A. Most of the time he rides back there in the observation car on the rear end of the train.

Q. This observation car, is that the car you are in charge of from San Antonio to Fort Worth, and then from Waco to San Antonio?

A. Yes, sir.

Q. Does the conductor come through the train frequently

or infrequently?

A. Some come through very frequently, and some don't come through so frequently, because, I guess, probably he is busy up ahead in the day coach; but most of them, after they check the day coach, they come back to the Pullman coach.

Q. Have you had any trouble on the train with passen-

gers?

A. I have not had what I call trouble, no, sir. I have not had what I call trouble with no passengers. I never have had no trouble; that is, personal trouble.

Q. Have you had any experience with passengers on your

car who had had too much to drink?

A. Yes, sir, I have, one or two men. I will say two den since I have been on this line.

Q. Was it serious enough that you had to call the train.

conductor, or what did you do about it?

A. Well, I think it might not have been serious enough, but I went and called the train conductor in this particular case.

Q. One of these cases?

A. Both cases L called the train conductor. The first case [fol. 286] was a man that got on at Austin, and he had a stub reading from Fort Worth to Austin, and when I went to check the Pullman transportation, he offered me this stub, and I asked him—I told him I couldn't honor it because it had already been used; and he said, "When did they get damn black nigger conductors on these cars?" I smiled and did not say anything. There were probably five or six men sitting in there who had already given their transportation up; and when he said, "No, I am not going to pay no seat fare to no damn nigger conductor," I thought—

Q. Did you tell him you were a conductor?

A. No, sir. He said, "When did they get damn nigger Pullman conductors on this car?" I said, "Captain, I am not a conductor: I am just a porter in charge, that is all." Then he said, "Lam not going to pay you."

Q. Did you report that to the train conductor?

A. Yes, sir.

Q. What did he do about it?

A. He came back and told him that he would have to pay the seat fare to the porter if he wanted to ride back in the Pullman, or he would have to go up front.

Q. Did he pay it?

A. No, sir; he said, "Well, I will go up ahead. Where do you want me to sit?"

Q. All right. Have you ever had any real rows with the passengers?

A. No, sir; never in my life.

Q. Have you ever had any experiences on these cars where one passenger was mistreating another passenger? [fol. 287] A. Well, one experience, where it would have been a mistreatment if probably I had not been right there and prevented it from being a mistreatment.

Q. Did you have any trouble handling it?

A. No, sir; I did not have any trouble handling it.

Q. Have you had any trouble making up your diagrams or reports to the Pullman Company?

A. No, sir; I have never had any trouble.

Mr. Graves: That is all.

Cross-examination.

# Questions by Mr. Lewis:

Q. About how frequent do you observe people that have been drinking too much, or who are boisterous for some reason or another?

A. Well, I observe them at all times, because I am in the

car at all times with them.

Q. About how often does that happen? Is that a fairly everyday occurrence?

A. No, sir; very seldom that I have had to contend with drunks on the cars.

Q. Sometimes they get drunk so that you have to contend with them, don't you?

A. No, sir; I don't remember of having any drunks. Most of the people who ride in the Pullman cars, very few of them are drunkards; most of them are high class people.

Q. I believe you said the brakeman sometimes rides in the Pullman?

A. Yes, sir.

[fol. 288] Q. Whereabouts in the Pullman?

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A He sometimes rides in Section 1 or Section 2, probably opposite where I am sitting, if there are passengers in the observation end. When there are no passengers in the observation end, most of the time he will sit back in the observation end.

Q. Does he ride back there all the time, or is that sort of

an exception?

A. He is first there, and then up at the front portion of the train. He has duties to perform on the front end at various times also.

Q. Which place does he spend most of his time?

A. When he is not arriving at some station very soon where he has to perhaps receive or discharge passengers on the head end, he spends all of his time back there.

Q. How many reports have you made to your company concerning disorderly conduct on the part of passengers?

A. Just two.

Q. Just the two you mentioned?

A. Yes, sir.

Q. Have those been the only instances of disorderly conduct that you remember?

A. The only ones that I can remember of during my twenty years.

Q. Do lewd women ever get on the cars?

A. Yes, sir; quite a few ladies I handle on my cars.

Mr. Graves: I think he misunderstood you.

[fol. 289] Q. Are you bothered with lewd women getting on the cars soliciting business?

A. No, sir; I have never seen a woman of that kind on the car. If she was one, I didn't know it.

Mr. Lewis: That is all.

Redirect examination.

# Questions by Mr. Graves:

Q. You worked in San Antonio before you worked for the Pullman Company?

A. Yes, sir; I did.

Q. Did you ever work for the Government?

A. Nine years in the Army.

Q. Did you ever work anywhere else there in San Antonio?

A. I worked at the Gunter Office Building eight and a half years; at the Gibbs Building two years; and I worked at the Post Office extra about two or three months before I came back on this job.

Mr. Graves: That is all.

(Witness excused.)

RIP C. Underwood, a witness called by the plaintiff, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is Rip C. Underwood?

A. Yes, sir.

Q. You live at Amarillo?

A. Yes, sir.

[fol. 290] Q. What is your business?

A. I am in the oil business. .

Q. You are also an attorney, are you not?

A. I used to be.

Q. In recent years have you had occasion to travel much or little?

A. Quite a bit.

Q. Do you use the railroads and Pullman cars for most of your travel?

A. Yes, sir.

Q. Have you had occasion to travel on any of these Pullman cars that were in charge of porters and where no Pullman conductor was present on the train?

A. Yes, sir; I have, quite a few.

- Q. Do you recall any specific lines of that kind that you have ridden on?
  - A. Well, I go to Oklahoma Gity quite frequently.

Q. On the Rock Island?

A. Yes, sir; and I know that situation prevails there; and I have ridden—I can recall a number of instances where I have bought my space from the Pullman porter, and I assumed he was in charge.

Q. Have you ridden frequently on the T. & P. between

Marshall and Texarkana?

A. Yes, sir, I was down at Texarkana quite a bit, and I have ridden that route; and also between Amarillo and Texline and Dalhart.

Q. On the Fort Worth and Denver?

A. On the Fort Worth and Denver up there, yes, sir. [fol. 291] Q. Have you ever ridden the daytime train that leaves here on the Katy at 3:55 in the afternoon for Fort Worth and Dallas?

A. Yes, sir.

Q. Well, that car was in charge of a porter, wasn't it?

A. Yes, sir.

- Q. What has been your observation as to the kind of service rendered to Pullman passengers on those cars, as compared with the service that the passengers get on the cars where the Pullman conductor is on the train?
- A. Well, my observation has been that there has been no difference.
- Q. Have you ever seen a Pullman porter have any trouble of any kind on a train?

A. No, sir.

Q. Are the cars kept as clean and neat and in as good condition under those circumstances as they are where the conductor is present?

A. Well, they have always been clean so far as I have

noticed it either way.

Mr. Graves: That is all.

Cross-examination.

Questions by Mr. Morgan:

Q. Mr. Underwood, do you have any children?

A. No, sir.

Mr. Morgan: That is all.

(Witness excused.)

[fol. 292] Leroy Brown, a witness called by the plaintiff, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

Judge Allred: How many of these Pullman car porters are you going to have?

Mr. Graves: About six, in addition to this one. We don't want to over-do this thing, but that is—

Judge McMillan: Mr. Graves, is your porter testimony

all practically the same, or is there any variance?

Mr. Graves: I don't believe there is any substantial variance. The three porters that have testified so far are the three intervenor plaintiffs. Some of these other porters have operated on other lines, but we don't propose to show that the record varies any. We think the record is about the same.

Judge McMillan: Can't parties stipulate that these other witnesses would testify to the same thing if put on the stand?

Mr. Culbertson: There has been a little variance.

Judge McMillan: Well, if you want to cross-examine them, I guess you have a right to do it.

Q. Your name is Leroy Brown?

A. Yes, sir.

Q. Are you employed by the Pullman Company as a porter?

[fol. 293] A. Yes, sir.

Q. Do you live in Fort Worth?

A. Yes, sir.

Q. How long have you worked for the Pullman Company as a porter?

A. Thirty-one years.

Judge McMillan: Where did he say he lived?

A. At Fort Worth.

Q. How long have you been living in Fort Worth?

A. Thirty-one years.

Q. Are you a married man?

A. Yes, sir.

Q. Where were you born?

A. Altheimer, Arkansas.

Q. How long have you lived in Texas?

A. Thirty-one years.

Q. How old are you now?

A. Fifty-one.

Q. On what line are you now running as a porter?

A. Fort Worth to Austin.

Q. How long have you been running on that line?

A. A little more than two years.

- Q. Do you get porter in charge pay for operating on that line?
  - A. Yes, sir.
- Q. And that is because the car is set out here in the morning after it gets here?
  - A. It is set out here at 4:30 in the morning.
- Q. And from 4:30 in the morning until 6:30 you are in [fol. 294] charge of the car?
  - A. Until 8:00 o'clock.
- Q. And at night when you receive passengers on this same car on the trip from Austin to Fort Worth, the car is in charge of the porter during what time?
  - A. From 11:30 until 1:20 in the morning.
  - Q. When the train leaves?
  - A. Yes, sir.
- Q. Have you ever had any other porter in charge operations?
  - A. Yes, sir.
  - Q. Where?
- A. Between Fort Worth and Denison on the Texas Special.
  - Q. On the Texas Special?
  - A. In route to St. Louis.
  - Q. On the Texas Special?
  - A. Yes, sir.
- Q. Now, the main line of the Texas Special—the main train goes through Dallas?
  - A. Yes, sir.
- Q. And there is a branch line that goes from Fort Worth to Denison, and there is combined with the main train?
  - A. Yes, sir.
- Q. And the car was in charge of the porter from Fort Worth to Denison?
  - A. Yes, sir.
  - Q. How long did you run on that line?
  - A. Between three and four years.
- Q. Is that all the porter in charge experience that you have had?
  - A. No, sir.
- [fol. 295] Q. Where else?
  - A. Between Fort Worth and Amarillo.
  - Q. On what railroad?
  - A. On the Fort Worth and Denver.

- Q. Did you stop in Amarillo?
- A. Yes, sir.
- Q. You were on a car that was set out at Amarillo?
- A. It was a daylight run, leaving Fort Worth and arriving in Amarillo, and back.
  - Q. During what part of the time were you in charge?
  - A. The entire trip both ways.
  - Q. Both ways on the Fort Worth and Denver?
  - A. Yes, sir.
  - Q. How long were you on that run?
  - A. Two years.
  - Q. Do you recall any others?
  - A. From St. Louis to Little Rock.
  - Q. On what road?
  - A. Missouri Pacific.

    Q. How long were you on that?
  - A. About a year.
- Q. Now, you referred to the Fort Worth and Denver run. Did you ever run on that same road all the way through from Fort Worth or Dallas to Denver?
  - A. Yes, sir; Colorado Springs and Denver.
  - Q. Colorado Springs and Denver?
  - A. Yes, sir.
  - Q. How long did you run on that line?
- [fol. 296] A. Off and on for three or four years.
- Q. While you were running on that line, did you ever have parents put their children on your car on that train run?
  - A. Yes, sir.
  - Q. In your charge?
  - A. Yes, sir.
  - Q. Has that happened frequently or infrequently?
  - A. It happens more on the Texas Special.
  - Q. It happens more on the Texas Special?
- A. Yes, sir, between Fort Worth and Denison, with children going to school.
- Q. Have you ever had any trouble of any kind on the train with a passenger?
  - A. Nothing serious.
  - Q. Have you had drunk passengers on your train?
  - A. Yes, sir.
- Q. Have you ever had any trouble handling drunk passengers?
  - A. No, sir.

Q. How do you go about handling them?

A. He is always the boss. I let him have his way.

Q. Do you let him impose on other passengers?

A. No, sir; I have never had any that made any attempt to impose on anybody.

Q. If a passenger abuses you, what do you do about that?

A. He never knowed it.

Q. Does it make you mad?

A. Yes, sir.

·Q. But he doesn't know it?

A. No, sir.

[fol. 297] Q. Have you ever had any unfriendly words with a passenger?

A. No, sir.

Q. On these porter in charge cars that you ran on, where did the brakeman usually ride?

A. The present run I am on, the brakeman rides in my car from Waco to Austin.

Judge McMillan: Unless the other people are going to controvert it, do you think you ought to accumulate that evidence? If they are going to controvert it, all right. You have already proved it by four witnesses.

Mr. Graves: All right. That is all.

#### Cross-examination.

## Questions by Mr. Lewis:

Q. You say you have not had any serious trouble: What was the nature of any trouble that you did have?

A. When a drunk man boards my car, I never consider that serious. I have just always considered that part of my work.

Q. Does that happen rather frequently?

A. No, sir.

Q. When one of those men abuses you, you just pass it off and go on?

A. Yes, sir.

Q. Do they do that in the presence of other passengers?

A. They do do it.

Q. Do you report that to anyone?

A. No, sir.

Q. Have you ever noticed any disorderly conduct upon one passenger towards another?

A. Not that I remember.

[fol. 298] Q. Have you ever noticed men trying to form fresh acquaintances with ladies?

A. No, sir; not recently.

Q. Have you noticed that on some occasions?

A. Well, during the oil boom at Amarillo it happened over there once or twice.

Judge McMillan: I didn't quite hear you.

A. During the oil boom at Amarillo I have had it happen.

Judge Allred: In trying to get acquiinted with ladies on the train?

A. Yes, sir.

Q. Have you ever had charge of more than one Pullman car or run?

A. Yes, sir.

Q. That is when the Pullman conductor was not on it?

A. Not regularly.

- Q. How frequently?
  A. Well, I have had—oh, two or three times.
- Q. Can you handle that as well as you do one?

A. No, sir.

Q. Are there other porters on the other cars too?

A. Yes, sir.

Q. On those occasions when a man passenger would try to make a fresh acquaintance with a lady, what would you do about it?

A. Report it to my conductor, if I had one.

Q. If you did not have one, what would you do?

A. Report it to the train conductor.

Q. How many times did you do that?

[fol. 299] A. I don't remember ever having to go to the train conductor about a thing like that.

Mr. Lewis: That is all.

Redirect examination.

Questions by Mr. Graves:

- Q. Have you ever run on a line where you received in charge as you do here at Austin?
  - A. Yes, sir.
  - Q. Where?
- A. Colorado Springs.

Q. Did you ever run in Texas on some other line in Texas where you received in charge?

A. At Wichita Falls.

Q. How long did you run on that line?

A. Seven years.

Q. Seven years?

A. Yes, sir.

Q. That is, there was set out a car at Wichita Falls, and you received the passengers in charge?

A. Yes, sir.

Judge Allred: About when was that?

A. That was during the oil boom, during 1914 to 1917, along there.

Q. You say that was back in 1915, 1916?

A. Yes, sir; during the War; and during the oil boom at Burkburnett out from Wichita Falls.

Q. What would you do if a passenger conducted himself in [fol. 300] such a way that he was interfering with other passengers or annoying other passengers?

A. If there was a conductor, I would report it to the con-

ductor.

Q. What is your instructions with reference to reporting it to the train conductor?

A. To report it to the train conductor when I am in charge and do not have a Pullman conductor.

Mr. Graves: That is all.

(Witness excused.)

Mr. Graves: We will ask J. P. Sample next.

J. P. Sample, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is?

A. J. P. Sample.

Q. J. P. Sample?

A. Yes, sir.

- Q. You are employed by the Pullman Company as a porter?
  - A. Yes, sir.
- Q. Are you operating on a line known as a porter in charge run?
  - A. Yes, sir.
  - Q. What is your run?
  - A. No. 3725.

[fol. 301] Q. From where?

- A. From Harlingen to Brownsville and return.
- Q. But where do you begin your run?
- A. Houston to Brownsville.
- Q. The train operates between Houston and Brownsville?
  - A. Yes, sir.
- Q. And the car that you are on operates between Houston and Brownsville?
  - A. Yes, sir.
  - Q. On the St. Louis, Brownsville & Mexico Railroad?
  - A. Yes, sir.
  - Q. That is part of the Missouri Pacific system?
  - A. Yes, sir.
  - Q. Where were you born?
  - A. Victoria, Texas.
  - Q. What is your age?
  - A. Fifty-seven,
  - Q. Are you married?
  - A. Yes, sir.
  - Q. Have children?
  - A. Yes, sir.
  - Q. Where do you live, Houston?
  - A. Houston.
  - Q. Live at Houston?
  - A. Yes, sir.
  - Q. How long have you been on this particular line?
- A. Well, I have been on this line several times off and on since 1918; this last time regular since there was a change made in the line a little over a year ago, but I had just been [fol. 302] off a little while, and then I went back.
  - Q. Have you ever lived at Victoria?
  - A. Yes, sir, I know everybody in Victoria.
  - Q. How is that?
  - A. I know everybody in Victoria.
  - Q. How long did you live there?

A. Well, I was born there, and I have been in Houston about thirty-six—thirty-four years; I came from Victoria to Houston.

Q. All right. Now, have you ever had any trouble with

passengers while you were running in charge?

A. No, sir.

Q. Have you had any experiences with drunk passengers?

A. Well, no, sir, not enough to mention, because our company requires us to make a statement about the least thing that happens on the cars that is unusual, and I have never had to do that.

Q. Your train carries a Pullman conductor, and how many

Pullman cars, between Harlingen and Houston?

A. Two.

Q. And one of those cars goes on to Mission?

A. Goes to Mission, yes, sir.

Q. In charge of the conductor?

A. Yes, sir.

Q. And the other car goes to Brownsville?

A. Yes, sir.

Q. In your charge?

A. Yes, sir.

Q.—for operating that twenty-five miles round trip?

A. Yes, sir.

Q. Have you had any experience on your train where a passengers insulted other passengers, or mistreated other

passengers?

A. No, sir, as a rule, the general in charge lines are lines that do not haul very many people anyway, and there is no way to have a fuss on my car hardly between Brownsville and Harlingen.

Q. What is the average number of passengers on that car?

A. Sometimes two or three, but when I catch Judge Allred and his bunch I have plenty of passengers.

Judge Allred: Nothing ever happens on those trips?

A. No, sir.

Judge Allred: Right there, what time does that train get into Harlingen in the morning?

A. In the morning at 6:50.

Judge Allred: And what time do we get to Brownsville?

<sup>9</sup> A. At 7:55. We don't leave Harlingen though until about 6:55.

Judge Allred: You mean that is 7:00 o'clock?

A. Yes, sir, I mean 7:00 o'clock.

Judge Allred: What time does it leave Brownsville in the evening?

A. It leaves Brownsville in the evening at 9:00 o'clock.

[fol. 304] Judge Allred: What time is it back up there at Harlingen?

A. 9:50.

Judge Allred: 9:50. All right.

Mr. Graves: That is all, gentlemen.

Cross-examination.

Questions by Mr. Lewis:

Q. Does anybody ever get on the Pullman that has an infectious or contagious disease?

A. Not that I know of.

Q. You have never seen that?

A. No, sir.

Mr. Lewis: That is all.

(Witness excused.)

Mr. Graves: Eli Morgan is our next witness.

ELI MORGAN, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

By Mr. Graves:

Q. Your name is Eli Morgan?

A. Yes, sir.

Q. And you work for the Pullman Company as a porter?

A. Yes, sir.

Q. Are you operating on a line known as a porter in charge line?

A. Yes, sir.

[fol. 305] Q. What line is that?

- A. It is line No. 3106 on the Fort Worth and Denver, between Dallas and Denver.
  - Q. Between Dallas and Denver, Colorado?

A. Yes, sir.

Q. That line operates during the busy season, during the summer time, with a conductor, does it?

A. Yes, sir.

Q. And during the off season-

A. With a porter in charge from Amarillo to Denver.

Q. How is that?

- A. With a porter in charge from Amarillo to Denver and back.
- Q. Yes. Your car runs all the way out from Dallas to Denver and back?

A. Yes, sir.

Q. And you are in charge of the car from Amarillo to Denver, and back to Amarillo?

A. Yes, sir.

- Q. Does the train have more than one Pullman car on it between Dallas and Amarillo?
  - A. Yes, sir, it has two as far as Amarillo.

Q. One car sets out at Amarillo?

A. Yes, sir.

Q. And you go on with the train to Denver?

A. Yes, sir.

Q. How long have you been running on that line?

A. I have been running on that line between three and four years.

Q. Have you had any other porter in charge experience? [fol. 306] A. Yes, sir, I ran on the Frisco, Santa Fe they call it, between—to St. Louis. That line has a car that goes from Dallas to Fort Smith in charge.

Q. You have run on that line?

A. Yes, sir.

Q. Any others?

A. Yes, sir, I run a line between Dallas and Alfus, Oklahoma, by way of San Angelo, up to Altus; I run from Sweetwater to Altus and back to Sweetwater in charge.

Q. Any other porter in charge experience?

A. Yes, sir, I run on a line between Dallas and St. Louis, from Wichita Falls to Whitesboro, in charge, and back.

Q. That was on the Katy?

A. Yes, sir.

Q. That line has been discontinued, hasn't it?

A. Yes, sir.

Q. You ran from Fort Worth to Wichita Falls in charge?

A. From Wichita Falls to Whitesboro in charge.

Q. To Whitesboro?

A. Yes, sir.

Q. And there it connected with another train?

A. Yes, sir.

Q. How long did you run on that line?

A. I ran on that line about three years.

Q. Do you remember any other porter in charge experience?

A. Yes, sir, I ran between Dallas and Shreveport, in charge.

Q. On what train?

A. On the M. K. & T., from Greenville to Shreveport in charge, and back to Greenville.

[fol. 307] Q. Well, is that all?

A. No, sir, I operated on a line between Dallas and Texarkana and Waco in charge, from Mt. Pleasant to Waco, and back, in charge.

Q. Any more?

A. No, sir, that is all.

Q. That is all?

A. Yes, sir.

Q. Have you had any trouble with a passenger on any of those operations?

A. No, sir, none whatever.

Q. Have you ever had any passengers on your train who had had too much to drink?

A. Yes, sir, I have seen many that had too much to drink.

Q. Have you ever had any of them to abuse you?

A. Well, a little, yes, sir.

Q. What did you do about that?

A. Well, the way I do about that, I just keep smiling and he never knows whether he abuses me or not.

Q. Suppose there is conductor, a Pullman conductor, on the train, do you have drunk passengers on those trains too? A. Well, yes, sir, I have had them when there was a Pullman conductor with me.

Q. As a rule who handles the drunk passenger, whether

there is a Pullman conductor there or not?

A. Well, as a rule the train conductor always handles them.

Q. Who puts him to bed?

A. Well, I put him to bed.

Q. Have you ever had parents to put children in your charge?

A. Yes, sir.

Q. Well, on what runs?

[fol. 308] A. Well, I have had them to put them in my charge on this run I am on now; I had a man to put a little boy in my charge from Amarillo to Denver, and then I have had some people put their boy in charge from Denver to Dallas with me and back.

Q. Have you ever had any old people in your charge, old ladies?

A. Yes, sir.

Q. Have you ever had any experience on your train where one one passenger mistreated another passenger?

A. No, sir, hone whatever.

Q. Did you have any trouble making up your diagram?

A. No, sir.

Judge McMillan: Where do you live?

A. Dallas.

Q. You live at Dallas. Do you operate out of Dallas?

A. Yes, sir.

Q. Now?

A. Yes, sir.

Q. Where were you born?

A. Navasota, Grimes County, Texas.

Q. Navasota in Grimes County?

A. Yes, sir.

Q. Are you a married man?

A. Yes, sir.

Q. How old are you?

A. Fifty-six.

Mr. Graves: That is all, gentlemen.

#### [fol. 309] Cross-examination.

# Questions by Mr. Morgan:

Q. You say your name is Morgan?

A. Yes, sir, Eli Morgan.

- Q. Where did you-family come from to Texas?
- A. Georgia.
- Q. Georgia?
- A. Yes, sir.
- Q. Eli, were you the porter in charge on that train from Denver down to Dallas recently and you had a little confusion about a drawing room for Mr. Gilbert down at Amarillo?
  - A. No, sir, I wasn't.
  - Q. You are not the one?.
  - A. No, sir.
  - Q. Do you know where that boy is now?
  - A. No, sir, I don't.
  - Q. You know about that, don't you?
  - A. No, sir, I don't.
  - Q. You don't know about that?
  - A. No, sir.

Mr. Morgan: All right, that is all.

(Witness excused.)

Mr. Graves: We will have Harry Sinclair next.

[fol. 310] H. H. Sinclair, a witness for plaintiffs, having been duly sworn, testified as follows:

### Direct examination.

### Questions by Mr. Graves:

- Q. Your name is H. H. Sinclair?
- A. Yes, sir.
- Q. You work for the Pullman Company as a porter?
- A. Yes, sir.
- Q. What is your age?
- A. I will be sixty-one my next birthday; I am sixty past now.
  - Q. You are sixty years of age?
  - A. Yes, sir.

Q. Where do you live?

A. I live at Lamarque now, in Galveston County.

Q. Lamarque?

A. Yes, sir.

Q. That is about

A. About fourteen miles from Galveston.

Q. Do you own your home?

A. Yes, sir.

Q. Is it paid for?

A. Not quite.

Q. How long have you been employed by the Pullman Company?

A. Thirty-three years.

Q. Did you start out as a porter?

A. No, sir.

Q. Started out as a cleaner?

A. Cleaner, yes, sir.

[fol. 311] Q. When?

A. 1906.

Q. And you have been operating as a porter regularly since when?

A. Regular since 1910.

Q. Now, you travel on the train—your regular run now is on the—a train that operates between Galveston and St. Louis, is that right?

A. Yes, sir.

Q. On what railroad?

A. Missouri Pacific.

Q. And you live at the Galveston end of the run?

A. Yes, sir, at Lamarque in Galveston County.

Q. Where do you stay in St. Louis?

A. At the Y. M. C. A.

Q. How long have you been running on this one line?

A. Oh, I have run in charge over there for about seven years, but I have been operating on the Missouri Pacific before the Sunshine was put on, oh, I guess about twenty or twenty-five years ago.

Q. Have you ever had any other porter in charge experi-

ence?

A. Yes, sir.

Q. On what railroad?

A. The Santa Fe.

Q. How long did you run on that?

A. About, oh, about a year or year and a half.

Q. Now, you are in charge of a Pullman car between Galveston and Houston?

A. Yes, sir.

Q. On the north or west bound trip, that train leaves Gal-[fol. 312] veston when?

A. Ten-thirty in the morning.

Q. And arrives at Houston at about?

A. At 11:59.

- Q. At 11:59, and then at the other end of the trip when you are coming back, what time does the train arrive at Houston?
  - A. It arrives in Houston at 12:55.

Q. P. M.?

A. Yes, sir.

Q. And arrives—and then it goes to Galveston, and arrives there at about what time?

A. 2:40.

Q. 2:40 in the afternoon?

A. Yes, sir.

- Q. Approximately how many passengers do you handle on that car between Galveston and Houston?
- A. Well, about three or four on an average; sometimes going to Galveston we have more, more than three or four, to Galveston, but Galveston only holds two sections in the car out of Galveston; Houston holds the rest of it.

Q. Do you sell the Pullman transportation at Galveston?

A. No, sir, most of them have tickets; sometimes a passenger may come up after he has made a reservation and didn't get to the ticket office in time to buy his ticket, and his name is on the diagram, I might possibly have a telegram that lower four or lower nine is reserved for him in his name, and I would sell it to him then, or I might pick up a passenger between Galveston and Houston, and if this [fol. 313] space was open and the passenger got on and wanted a berth to St. Louis I would sell it to him.

Q. Have you ever been on a porter in charge run where you operated at night?

A. Not all night, part of the night.

Q. Well, that train that you ran on on the Santa Fe, you

were in charge between what points?

A. Well, I had one line on the Santa Fe from Galveston to Fort Worth and from Fort Worth back to Galveston; and then I ran on the tourist car line a good many years ago from Galveston to Los Angeles; I was in charge of the car

from Galveston to Fort Worth, and in charge de the car from Oklahoma City to Newton, Kansas.

Q. That was line 14?

- A. That was not line 14; the tourist car line was not, but the other line was line 14; I forget the number of the tourist car line.
  - Q. Were you born in Texas?

A. Yes, sir.

Q. Where?

A. Corpus Christi.

Q. Do you belong to the church?

A. Yes, sir, Avenue L Baptist Church, in Galveston.

Q. Are you a married man?

A. Yes, sir.

Q. Own your home?

A. Yes, sir.

[fol. 314] Q. Well, I asked you about that.

A. Yes, sir.

Q. I beg pardon. You have one adopted child?

A. Yes, sir.

Q. Well, on any of these porter in charge operations where you were in charge, have you ever had any trouble of any kind?

A. No, sir.

Mr. Graves: That is all.

Mr. Lewis: No questions.

Mr. Morgan: No questions.

(Witness excused.)

[fol. 315] T. M. Palmer, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name is T. M. Palmer?

A. Yes, sir.

Q. You are employed by the Pullman Company as a porter?

A. Yes, sir.

Q. Are you operating on a line known as an in charge line?

A. I am.

Q. From what point to what point?

A. From Denison, Texas, to Kansas City and from Kansas City back to Denison, Texas.

Q. On the M. K. & T.?

A. Yes, sir, line 3273.

Q. Where were you born?

A. Texas, Burleson County.

Q. Burleson County?

A. Yes, sir.

Q. At Caldwell or near Caldwell?

A. Near Caldwell.

Q. How old are you?

A. Fifty-six.

Q. Where do you live?

A. San Antonio.

Q. Well, your train then—the train that you operate on, [fol. 316] plies between Kansas City and San Antonio, is that it?

A. Yes, sir.

Q. But you are in charge of the Pullman car between Denison and Kansas City?

A. Yes, sir, I have a conductor to Denison.

Q. You have a conductor between Denison and San Antonio, both ways?

A. Both ways.

Q. Yes. Now, approximately how far is it from Denison to Kansas City?

A. Well, I figure on it being about 400 miles.

Q. Around 400 miles?

A. Yes, sir.

Q. Do you operate a round trip of about 800 miles without a conductor?

A. Yes, sir, I am due to leave Denison at 11:40 a. m., and I don't see a conductor until 7:00 o'clock the next afternoon.

Q. Well, you don't have a conductor on your train until you get back to Denison, do you?

A. No, sir; I mean until 7:00 o'clock the next day, p. m.

Q. I see. Now, the part of that trip that is in charge of the porter in the State of Texas is from Denison to Platter, is it? Denison to the state line?

A. Yes, sir. Well, we always call-

Q. Just a few miles?

A. We call it Red River.

Q. You call it Red River?

[fol. 317] A. Yes, sir, it is about five miles.

Q. About five miles. The rest of it is out of the state of Texas?

A. Out of the state of Texas.

Q. You are a married man?

A. I am.

Q. Own your home?

A. I am buying it.

Q. How long have you been with the Pullman Company?

A. I think I have about twenty-three years service, but I have been with them continuously about twenty.

Q. Continuously for twenty years?

· A. Yes, sir.

Q. What other employment have you had?

A. Well--

Q. What were you doing when you went with the Pullman Company the last time?

A. I am a barber by trade.

Q. I see.

A. I was barbering.

Q. I see. I thought you worked for the Y. M. C. A. for a while?

A. Well, that is why I said continuously. In 1916 I commenced working for the Pullman Company, and then I entered the army in about 1917.

Q. I see.

[fol. 318] A. And I was the building secretary of the Y. M. C. A. during the war—the World War.

Q. I see. Have you ever had any trouble with passen gers on your train?

A. No, sir, not yet.

Q. Have you had experience with drunk passengers?

A. Some, yes, sir.

Q. Have you, ever had any experience where the conductor or the—the Pullman conductor or the train conductor called on you to help them with a drunk passenger?

A-No, sir, not with a train conductor, but sometimes I have when I had a conductor; we would have a drunk man on, and of course the conductor would tell me he is drunk, and I says, 'Well, let me handle him, probably I can do a little more with him than you can." So I go at him in a nice way; if it is night I get him to bed, put him to bed, and then I—and he commences telling me,

"Porter, you are my friend," and I say, "Oh, yes, I am right with you," and I say, "get in the bed," and he says, "all right."

Mr. Graves: That is all.

Cross-examination.

Question's by Mr. Culbertson:

Q. Let me ask you one question. Have you ever in your experience had any occasion to see a man and a woman trying to get acquainted in Pullman cars, or a man and a woman?

A. No, sir.

Q. How long did you say—twenty-three years with the [fol. 319] Pullman Company?

A. Yes, sir, I have twenty years service.

Q. Now, during all that twenty-three years have you ever seen a man trying to make a fresh acquaintance with

a young lady or a lady on a Pullman car?

A. Oh, I have seen men in the day time go up and get acquainted with a lady, maybe she is riding alone, and finally maybe the man gets acquainted with her and they commence talking civilly and modestly, and sometimes they would even carry them to lunch or dinner, but I don't think he was trying to be even fresh; I never have seen nothing like that.

Q. The average white man in Texas would resent any attempt to correct him if he committed any misconduct,

wouldn't he?

A. I don't know.

Q. How is that?

A. I say I don't know.

Q. You don't know?

A. No, sir.

Q. Have you ever had a white man resent any attempt on your part to perform your duties?

A. None, no, sir,

Q-You never have had that to happen at all?

A. No, sir.

Mr. Culbertson: That is all.

(Witness excused.

[fol. 320] Charley Thurmond, a witness for plaintiffs, having been duly sworn, testified as follows:

#### Direct examination.

# Questions by Mr. Graves:

Q. Your name is Charley Thurmond?

A. Yes, sir.

Q. What is your age?

A. Fifty-nine, sixty my next birthday:

- Q. Sixty your next birthday. How long have you been with the Pullman Company?
  - A. Thirty four years.

Q. Thirty-four years?

A. Yes, sir.

Q. Have you had any experience operating as a porter in charge?

A. Yes, sir.

Q. Are you operating on such a line now?

A. Yes, sir.

Q. Well, first I will ask you where do you live?

A. Fort Worth.

Q. How long have you lived in Fort Worth?

A. Thirty-five years.

Q. Are you a married man?

A. Yes, sir.

Q. Own your home?

A. Yes, sir.

- Q. All right. Now, Charley, you—how much education [fol. 321] have you had?
- A. I spent two years in Bishop College, after finishing high school.

Q. What line are you now operating on?

A. 3271.

Q. From Fort Worth to Austin?

A. Yes, sir.

Q. Is that the same line that Leroy Brown is on?

A. Yes, sir.

Q. All right. You heard his description of it, and you and he are on the same run?

A. Yes, sir.

Q. In other words, you come down one night and he comes down the next night?

A. Yes, sir, the car I carry in he brings it out.

Q. Yes. Now, have you had any other porter in charge experience?

A. Yes, sir.

Q. Tell us about some of them.

A. Let's see, I ran—well, let's see, I hauled soldiers during the war fourteen months in charge.

Judge Sibley: That is over with. We are thankful that these are peace times.

A. Yes, sir, I am glad too, Judge. And I run between Amarillo and Sweetwater.

Q. On what railroad?

A. The G. C. & S. F.

Q. The G. C. & S. F.?

A. Yes, sir.

[fol. 322] Q. And you were in charge on that line?

A. Yes, sir.

Q. Well, what about the Brownwood, Sweetwater and Wichita Falls?

A. In charge at Sweetwater-at Wichita Falls.

Q. What about from Wichita Falls to Fort Worth?

A. In charge at Wichita Falls:

Q. That is receiving at Wichita Falls?

A. Yes, sir.

Q. How long have you been running on this line between Fort Worth and Austin?

A. Since August 24, 1934.

Q. Since 1934?

A. Yes, sir, August 24th.

Q. That is six years and a half?

A. I think so.

Q. You are pretty well acquainted with the passengers that travel regularly between Fort Worth and Austin?

A. I know quite a few of them.

Q. Are you well acquainted in Fort Worth?

A. Well, I think I am.

Q. Charley, how do you go about handling a drunk passenger?

A. Oh, well, it depends on how they conduct themselves as to how I conduct myself; but there is never an occasion whereby I show any contempt or dislike to their conduct; [fol. 323] I try at all times to keep a smile on my face, and whatever—

Q. Well, from-

A. Pardon me.

Q. How is that?

A. Whatever service that I can render to them I am there doing it with a smile.

Q. Have you ever had a personal difficulty or a fight with

a passenger?

A. Not in my natural life, no, sir.

Q. Have you ever tried to order a passenger around, whether he was drinking or not?

A. No, sir.

Q. And tell him what he had to do?

A. No, sir.

Q. Now, from your experience in both porter in charge runs and in runs where you have operated with conductors in charge, I will ask you to state whether you feel that you are pretty well qualified to handle drunk passengers?

A. Well, I can only cite my past record in handling them;

from that standpoint I feel that/I am.

Mr. Graves: That is all. That is all, gentlemen.

Cross-examination.

### Questions by Mr. Morgan:

Q. Do you have a good many drunks going out of Austin?

A. No, sir.

Q. Well, do you ever have any?

A. Yes, sir.

[fol. 324] Q. Do you ever have drunks come down there and wake passengers up that have gone to bed early?

A. No, sir.

Q. You mean that has never happened?

A. No, sir, not by me.

Q. At no time?

· A. No, sir.

Q. Now, you just bring the car down from Fort Worth to Austin and it is set out here, is that it?

A. That is right.

Q. Then you go back?

A. That is right.

Mr. Morgan: I think that is all.

Mr. Graves: That is all. Thank you.

(Witness excused.)

Mr. Morgan: If Your Honor please, if we could have about five minutes we might be able to stipulate some, if this is going on indefinitely; we might talk to counsel.

Mr. Graves: I believe it would take us less time to finish with this one, witness. That is all we have today, and before we bring in any more we might talk about a stipulation.

Mr. Morgan: All right, go ahead.

[fol. 325] NOAH LANE, a witness for plaintiffs, having been duly sworn, testified as follows:

Direct examination.

### Question- by Mr. Graves:

Q. Your name is Noah Lane?

A. Yes, sir.

Q. Where do you live?

A. Ballas, Texas.

Q. How old are you? .

A. Fifty three.

Judge McMillan: How old? The Witness: Fifty-three.

Q. You operate as a porter in charge for the Pullman Company?

A. Yes, sir.

Q. On the line

A. 3259.

Q. —running between Dallas and Austin?

A. Yes, sir.

Q. How long have you been on that line, regularly?

A. Since 1931 this time; I have been on the line twice.

Q. Been on the line twice, but continuously now since 1931?

A. Yes, sir.

Q. You know a good many passengers that travel between Dallas and Austin, then?

A. Yes, sir, I know most of them.

Q. That car is in charge here during the same period as [fol. 326] the car—as the Fort Worth car?

A. Yes, sir, the same thing.

Q. That Brown and Thurmond have testified about?

A. Yes, sir.

Q. And you get the porter in charge compensation?

A. Yes, sir.

Q. On that account?

A. Yes, sir.

Q. Where were you born, Noah?

A. Marshall, Harrison County, Texas.

Q. How long have you lived in Dallas?

A. 35 years.

Q. Are you pretty well acquainted in Dallas?

A. Yes, sire

Q. What church do you belong to?

A. The Goodstreet Baptist Church.

Q. Do you drink?

A. No, sir.

Q. Don't drink at all?

A. No. sir.

Q. What's been your experience with drunk passengers on the train—how have you gotten along with them?

A. I humor them.

Q. You humor them?

A. Yes, sir, and coax them along. I get along with them all right.

Q. Get along with them all right?

[fol. 327] A. Yes, sir, I have at times when they was drunk, and one occasion—it has been a good long time ago, about 13 or 14, if I make no mistake, I had a man that was drunk, and the conductor didn't want to let him on because he was drunk.

Q. You mean the Pullman conductor?

A. The Pullman conductor, yes, sir. I knew the man very well, and I said, "If you will let me have him," he was kinda bad, and I said, "If you will let me handle him we will save trouble for all concerned." Well, he went along and let me alone, and I got him on the car and he wouldn't give up the tickets to the conductor and I said, "If you will just leave him to me I will take care of him;" I said, "I know him and I will take care of him," but I was afraid to let him go to bed because he had two guns on, and I was afraid to let him go to bed with those guns on because he might wake up in his sleep and take a shot at somebody, just for fun in

his sleep, or something, and I coaxed and begged him to let me have his guns, and put them away, and said & would keep them for him until in the morning, and after I persuaded with him for a long time,-"If you will wear them I will let you have them," he said, and well, you can see my size; he was small, and the belt wouldn't go around me with the two guns on it, and I wanted to put them in my locker, and he said, "No, you have got to wear them." I said, "Well, they [fol. 328] won't meet, the belt won't meet on me, that's all." He said, "Get a string and tie it on," and so I taken a string off of a linen bag, and I made the belt meet, and fastened the guns on me that way, and he still wouldn't give his tickets up to the conductor; the conductor was Charlie Dannish, if I make no mistake, that was his name; I said, "If you will just leave him to me-I will get his tickets from him; just leave him alone and leave him to me," which he did, because he said if he had to come back in the car again, he would have some fun with him. So the conductor stayed outside and so the next morning we were going into Hillsboro and he got up, he just waked up and got up, and I met him and I says, "Mr. Lee," I says, "are you getting along all right?" He says, "Yes, yes, fine." I says, "Now, when you have got time I will take your tickets." I said, "You didn't give up your tickets last night." He said, "Didn't I?" I says, "No, sir." "I didn't," he says, "Why, I don't know why I didn't." I says, "You told me you had done give them to me," and then he said, "Come on help me find them," and so he and I looked through his clothes and we found them in his watch-pocket in his vest and he had the Pullman and Railroad tickets, and gave them to the conductor; and, of course, from that time he was all right. You call that trouble, but I call it fun. On Friday night, I had a man here that was down here and he didn't have his clothes on, and he was unusually loud and I told him, I says, "Please, be [fol. 329] quiet," I says, "there is a lady here;" He used some pretty bad language and I said, "Please be quiet, a lady will hear you," and he said, "All right, I won't say any more;" and I got him to bed; I was about an hour late getting him there; of course, I was fixing to go to bed and I was about an hour late getting him in byd but I finally got him in bed and I seen that everything was all right and he was asleep and he had his pants lying down spreading out in the middle of the floor and I was afraid that his purse

asleep, and after he was asleep I went to bed, and the next morning he woke up and was all right and didn't know anything about it. Those are the most serious cases I have had with drunks.

Q. Well, you have never had any trouble, then, with drunk passengers that you couldn't handle?

A. No, sir.

Q. Along those lines?

A. No, sir.

Mr. Graves: That is all, gentlemen.

Mr. Lewis: No questions. Mr. Morgan: No questions. Mr. Graves: That is all.

(Witness excused.)

[fol. 330] Mr. Graves: If the Court would give us about five minutes I believe it would save time, if Your Honor is going to take a recess this afternoon.

Judge McMillan: It is 3:30.

Judge Sibley: All right.

(Thereupon Court was recessed at 3:30 p. m. until 3:45 p. m.)

J. I. Poole, a witness produced by the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Graves:

Q. What is your name?

A. J. I. Poole.

Q. Where do you live?

A. Smithville, Texas.

Q. Are you employed by the M. K. & T. Railway Company of Texas?

A. Yes, sir.

Q. In what capacity?

A. Trainmaster.

Q. How long have you been in the employ of the M. K. & T. Railroad Company?

A. Between 28 and 29 years.

Q. In what different capacities?

A. I entered the service of the M. K. & T. as a Train Dis-[fol. 331] patcher, served in that capacity until 1928, made Yardmaster and served as Yardmaster and promoted to Trainmaster until 1919, and served in that capacity until 1931, reduced from Trainmaster to Chief Dispatcher in 1931, served as Chief Train Dispatcher until 1938, when I was transferred to South Texas as Trainmaster.

Q. State whether it is your duty to see that the rules of the company in respect of the operations of trains are car-

ried out.

A. That is my responsibility, yes, sir.

Q. And part of the territory between San Antonio and Fort Worth, and these Katy trains that have been described here, as being porter in charge lines, is that in your jurisdiction?

A. Between San Antonio and including Waco, is my territory.

Q. So, the train employees and train crews that operate from San Antonio to Waco are under your jurisdiction?

A. Yes, sir.

Q. What does the railroad company do with the view of

seeing to it that the rules are actually carried out?

A. Well, there is various things that we do, depending entirely on the case. We continually make checks, that is part of my job, and several others do the same thing; to see that the rules are complied with; and if they are not, to make necessary arrangements to get them complied with.

Q. Do you actually ride the trains for that purpose?

A. Almost continuously.

[fol. 332] Q. Have you got a copy of the rules of the Transportation Department of the Missouri-Kansas & Texas Lines with you?

A. Yes, sir.

Q. I will ask you if that is a copy of the rules that are currently in effect?

A. 1925, Transportation Department, yes sir.

Q. We will offer these rules in evidence, and I would like to ask the witness some questions about them. And then I will turn it over to the Reporter.

(Thereupon said rules were admitted in evidence as Plaintiff's Exhibit No. 15.)

#### By Mr. Graves:

Q. Mr. Poole, who is in charge of the Passenger trains?

A. A train conductor.

Q. In charge of all trains?

A. Yes, sir.

Q. Is he in charge and command over all of the employees on the train, including the Pullman Company employees?

A. Yes, sir, from the pilot to the tail end of it.

Q. Who, according to the Rules, has authority to eject a passenger from the train?

A. No one except the passenger train conductor.

Q. What rule is it that covers that?

A. 495, I believe you will find it. I will read it for you. 495 is the rule.

Q. Will you read that rule, please, or the portions of that that deal with that?

A. "No train man other than the conductor has authority [fol. 333] under any circumstances to accept anyone as a passenger. No train man other than the conductor has authority to eject a passenger or trespasser from a train, save under the immediate supervision and direction of the conductor." Is that the part you had reference to?

Q. Yes. Now, turn over on the next page and read the

paragraph, the second paragraph on page 106.

A. "It is the duty of the conductors and trainmen to attend to the safety and comfort of passengers lawfully on their trains, and to protect them against actual or threatened violence and abusive, profane and obscene language, or conduct, and any passenger guilty of such violence, language or conduct should be ejected from the train."

Mr. Culberson: What page was that on, Mr. Poole? A. 106.

#### By Mr. Graves:

Q. What rule requires the employees on the train to report difficulties on the train or anything out of the ordinary to the passenger conductor?

A. Well, the rules, there are two or three rules there—let's see, I will call it off to you.

Q. What about Rule 402. Read that.

A. 402. "All employees, especially those in places of trust, are required to report any misconduct or negligence af-

fecting the interests or safety of the railroad, and withholding such information will be considered proof of negligence or indefference, and treated accordingly." [fol. 334] Q. What rule is that which prescribes the duties

of the conductor in respect of passing through the train?

A. Well, the Rule 507, I believe it is, just offhand. I will look here and see.

Q. Look at 502.

A. 502, I was pretty close to it, I believe. "Unless otherwise instructed, passenger conductors are required to be in attendance on their trains in regular uniform, such time in advance of leaving as prescribed by special instructions, and to remain in attendance in full uniform until they reach the end of their run, discharge their passengers and deliver their trains in proper condition to their successors or yard men. They will be held responsible for the cleanliness, regulated temperature and proper condition of the cars in their trains, and for the prompt action and general good conduct of their baggage men, brakemen, and porters, requiring them to be on duty in regulation uniform, the prescribed time before leaving, and to remain so until the end of their runs, and all of their duties have been performed."

Q. Read Rule 505.

A. "When practicable, conductors must pass through cars occupied by passengers at least once every hour."

Q. And 503.

A. "Passenger conductors must personally give proceed signal from station platform at all points where stops are made."

[fol. 335] Q. Please read 756.

A. 756. "Temperature for cars in service: Coaches in through service 65 to 70 degrees; Pullman sleeping cars between the hours of 10 p.m. and 6 a.m., about 60 degrees; Pullman sleeping and parlor cars in daytime, 65 to 70 degrees. Temperature should be kept below rather than above the highest figure given. Train conductors, at time of taking charge of trains placed in stations, must observe the temperature in each car, and if found underheated or overheated, they must report same promptly, and thermometers in any steel-cars register the maximum temperature, as provided for in instructions covering coach equipment, and in the judgment of conductor is not comfortably heated, the maximum temperature may be increased, and report made by the conductor."

Q./Read 507, Mr. Poole.

A. "All trains will be run under the directions of the conductor except when they conflict with the rules, or involve risks, in which the engine man will be held equally responsible."

Q. 495.

A. 495. I believe we read that, didn't we Judge? About the ejecting of passengers?

Q. All right. Do you give instructions to your conduc-

tors from time to time?

A. Yes, sir.

Q. The Trainmaster does?

[fol. 336] A. Orally and otherwise, yes, sir.

Q. Does the railroad company make any distinction between the Pullman passengers and passengers on the other part of the train in respect of the service rendered to them by the train crew?

A. No, sir, they are all our passengers and are taken

care of accordingly.

Q. Where is the rule that provides that the brakeman will ride on the rear?

A. 443-A, on the Revised Rules. It was issued May 1st, 1939, I believe it is. Let's see. I have the rule somewhere here. April 1st, 1939. 443-A.

Q. Read the last paragraph of that rule, please, sir.

'A. "Passenger brakemen or flagmen will, so far as practicable, ride near rear of passenger trains to observe and acknowledge signals, and may, when necessary, ride in lounge cars and observation sleepers, when it can be done without inconvenience to passengers."

Q. Is there any rule that would exempt the train conductor from responsibility for the Pullman cars or the pas-

sengers in the Pullman cars?

A. No, absolutely none.

Q. Mr. Poole, are these rules reasonably well complied with?

A. Yes, sir, I say they are.

Q/ And it is your business—

A. If they wasn't, I wouldn't be here.

[fol. 337] Q. Do you mean they would get somebody to fill your job?

A. They would get somebody that would.

Q. Are these rules that you have particularly referred to,

and specially referred to here and read, what are known as standard railroad rules?

A. Yes, sir, they are known as standard rules; while not verbatim, they do not read like some of the lines, they are practically the same all the way through. They are known as standard operating train rules.

Q. Do they apply on all railroads in the State of Texas?

A. I would say yes, practically the same. All of the rail-roads that I know of have what we call the standard rules.

Q. Do you know of any reason why the service rendered on the Pullman cars that are known as these porter in charge runs is inferior in any way to the services on the other cars, other trains?

A. No, sir, the runs where we have those, two runs that I presume that you refer to, between San Antonio, on three and four, they are short runs, and I would say if anything, they would have more attention, but the care is just the same.

Q. All right. That is all, gentlemen.

Cross-examination.

#### Questions by Mr. Morgan:

Q. Mr. Poole, according to your contracts between the railroads and the Pullman Company, the Pullman employees

are not employees of the railroad, are they?

A. Well, they are not considered so. So far as our trans-[fol. 338] portation rules are concerned, but certainly if there was any misconduct on their part, we would do something about it, if that is what you have reference to. I don't think they get their pay off of our payroll. I don't know how they arrange that part of it.

Q. You assume the same responsibility for passengers in a Pullman as you do passengers in a chair car is that

correct?

A. Yes, sir.

Q. And that Pullman is just as much a part of that train as the chair car is a part of the train?

A. Yes, sir.

Q. The Pullman car is just as much a part of the train as the engine?

A. Yes, sir, it is a part of the train.

Q. And you treat it and operate it as such?

A. Yes.

Q. If a passenger on the Pullman car is boisterous and loud and undresses, and so on, it is the duty of the operator

of the Pullman car to have him ejected?

A. If he couldn't be handled any other way. We have lots of things come up that they don't necessarily have to eject the passenger. I will say that there are few of those cases, it — seldom that those cases occur.

Q. As a matter of fact, you don't have a strict compliance with those rules, but what you think as a matter of expe-

dience that may occur on each particular occasion.

A. I don't agree with you. I think the meaning of the [fol. 339] rule is complied with.

Q. I am not going to argue the point, Mr. Poole.

A. I was trying to give you an answer, I beg your pardon.

Q. If a man should do that, he would be in violation of the rule?

A. If he would do what?

Q. If he was loud and boisterous and cursing there, and

making a noise.

A. I wouldn't say if he cursed to the extent that it would—if he cursed to the extent that it would be an annoyance to the other passengers, the lady passengers, there are conditions that enter into it. I have heard people use profane language in places where I didn't think it would be considered an annoyance. It would be a matter of handling the condition as it would arise, as to who was present.

Q. You are not employed by the Pullman Company?

A. No, sir.

Q. You are a railroad man, instead of a Pullman employee?

A. Yes, sir, I am employed by the M. K. & T. Railroad.

Q. And I believe you say you are the Trainmaster?

A. Yes, sir, in charge of the Katy operations in this section.

Q. In charge of operations in this section?

A. Yes.

Q. During your many years' experience in that operation, has the railroad ever tried substituting negro men in the place of white conductors?

[fol. 340] A. In charge of the trains, you mean?

Q. Yes.

A. No, they had white conductors when I came to the Katy, and we still have them.

- Q. You still have them?
- A. Yes, sir.
- Q. At any time have you ever tried using a porter in charge of the train instead of the conductor in charge of the train?
  - A. We have porters on our trains that are very efficient in their particular jobs.
  - Q. I understand, but have you ever put a porter in charge of your train, and not had a white conductor in charge?

A. No, sir, I have never operated a passenger train with

a negro in charge of it, no, sir.

- Q. Now, Mr. Poole, isn't it a fact that you—under the laws of this state, that you haul the colored passengers in one section of the train, and the white passengers in another section of the train?
  - A. Yes, sir.
- Q. And do you not obey that law, and is that not a rule you comply with continually in the movement of passengers?

A. Yes, sir.

Q. Isn't it also a fact that the colored passengers are in the front part of the front coach, according to the Jim Crow law, isn't that where they usually ride?

A. Yes, sir, that is the usual practice, depending upon the

[fol. 341] make-up of the train.

- Q. You don't have any colored passengers in the Pullman car?
  - A. No, I have known of it happening, but not frequently.

Q. That is all.

(Witness excused.)

H. R. McKee, A witness produced by the plaintiffs, having been first duly sworn, testified as follows:

# Direct examination:

#### Questions by Mr. Graves:

- Q. What are your initials, Mr. McKee?
- A. H. R.
- Q. Where do you live?
- A. Slaton; Texas.
- Q. You are employed by what railroad?
- A. By the P. & S. F. Railroad.

Q. That is the Panhandle and Santa Fe?

A. A subsidiary of the Santa Fe Railroad.

Q. That is, then, a part of the Santa Fe system?

A. Yes, sir.

Q. In what capacity are you employed?

A. Division Superintendent.

Q. The part of the Santa Fe System between Clovis and Sweetwater, is that in your Division?

A. It is.

[fol. 342] Q. Are you familiar with the operations of that train that carries a Pullman car from Oakland—I mean from New Orleans to Oakland, California?

A. Yes, sir, quite familiar with it.

Q. It passes through your territory?

A. Yes, sir. It passes through Slaton.

Q. And the train employées on that car are under your supervision?

A. Yes, sir.

Q. I mean on that train?

A. Yes, sir.

Q. Mr. McKee, you heard the rules read by Mr. Poole, who has just testified?

A. Yes, sir.

Q. I will ask you to state whether or not those are substantially the standard Railroad Rules?

A. Those are substantially standard rules, and are in effect on the Santa Fe Railroad, in substance. The wording might be somewhat different, but the meaning is the same.

Q. Does the Santa Fe also regard the passengers on the Pullman cars as railroad passengers?

A. They do.

Q. Does the Santa Fe recognize the responsibility of giving to them the same service that it gives to the passengers on other parts of the train?

A. Yes, sir.

[fol. 343] Q. The conductor with the Santa Fe is also in charge of the entire train?

A. Yes, sir, the conductor, he is the captain of the train,

there is no question about that.

Q. Now, you heard Mr. Poole's ter'imony about the operations of the Katy. I will ask you to state whether the Santa Fe is operated in substantially the same way?

A. Yes, sir, very much the same. I see very little difference, if any. I might say, in the way of observation, that

we make it a point to see whether the rules are observed. We have trainmasters, transportation inspectors that get on these trains out at way stations to find out what is going on, rather than leaving from the terminal, and we think we know pretty well what is going on on our trains.

Q. How long have you been employed by the Santa Fe

Railroad?

A. 30 years.

Q. In what different capacities?

A. Superintendent 12 years, Trainmaster 15 years, and Chief Dispatcher and Train Dispatcher, 3 years.

Q. Is it your duty to see that these standard operating rules are performed and are carried out?

A. It is. .

Q. Do you think they are?

A. I am certain that they are.

Q. That is all, gentlemen.

#### [fol. 344] Cross-examination.

# Questions by Mr. Morgan:

Q. Mr. McKee, you say you live out in west Texas?

A. Yes, sir.

Q. And you have been with the Santa Fe, the same system for a number of years?

A. Yes, sir.

- Q. Have you ever known of the Santa Fe trying to use that plan of substituting train porters in lieu of train conductors?
  - A. No, that never happened on the Santa Fe.

Q. It never happened on that train?

A. You are talking about train conductors, not Pullman conductors?

Q. Yes, sir, train conductors.

A. No, that never happened on the Santa Fe.

Q. You use only white men for your train conductors?

A. Yes, sir.

Q. You have them in charge of the train?

A. Yes, sir.

Q. They have charge of the engineer and fireman and baggage men and express man; they are all under his general supervision?

A. Yes, sir.

Q. And your Pullman car, when it is tied on to a Santa Fe train, it is an integrated part of the entire train?

A. Yes, sir.

[fol. 345] Q. It is just as much a part of the Santa Fe train as the chair car, or the engine is a part of the train?

A. That is right.

Q. You treat it as such, don't you?

A. Yes, sir.

Q. You treat the passengers as such, don't you?

A. Yes, sir.

Q. You, of course, are familiar with the fact that the railroad companies, not only the Santa Fe, but all other companies, charge an additional fare for passengers that ride in the Pullman cars, over and above the regular fare they would have to pay to chair cars?

A. Yes, sir, that is Pullman fare.

Q. That goes first to the Railroad and the Pullman charges extra fare for the berth?

A. Yes, sir.

Q. Isn't that practice uniform among all railroads in Texas, Mr. McKee?

A. I think so, as far as I know.

Judge Sibley: Mr. McKee, do any of the Texas railroads

run their own sleeping cars?

A. Not to my knowledge. I might qualify that by saying I have only been in west Texas about a year and a half. Formerly I was in New Mexico, Kansas and Colorado. My experience in west Texas is only a year and a half, but answering your question, I know of no line that operates independently.

[fol. 346] Mr. Morgan: That is all, Your Honor.

Redirect examination.

### Questions by Mr. Graves:

- Q. Do you know about these streamline trains that are operated between Dallas and Houston; that is, daylight trains?
  - A. No, sir, I have never been over in that territory.

Q. I see.

A. We had streamline trains supervision in New Mexico that ran between Los Angeles and Chicago, but I am not acquainted with the Fort Worth territory.

Q. All right, sir, thank you.

(Witness excused.)

W. J. Roglas, a witness called by plaintiffs, having been duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Anderson:

Q. State your name.

A. W. J. Rogers.

Q. What is your position?

A. Chairman of the Southwestern Passengers Association, and also publishing agent under power of attorney on file with the Interstate Commerce Commission.

Q. How long have you been so employed?

[fol. 347] A. I have been with the Southwestern Passenger: Association almost twenty years. Prior to that time I was with the Missouri, Kansas & Texas for almost thirty years.

Q. In your capacity under power of attorney on file with the Interstate Commerce Commission and the rate regulating authorities of the various states in the Southwest, including the state of Texas, are you familiar with the tariff schedules?

A. Yes, sir.

Q. Do the transportation charges in the state of Texas

have nation-wide application?

A. Yes, sir; except as to coach fares, certain territory like the Southeast have a lower rate than we have in the Western territory. Where we have a rate of two cents per mile for transportation and chair cars, they have one and a half cents, except one or two lines in the Southeast that adhere to two cents, the same as the west.

Q. What are the maximum fares prescribed by the Inter-

state Commerce Commission?

A. For transportation in sleeping or parlor cars, three cents per mile. For transportation in coaches or chair cars in western territory, it is two cents per mile. In the Southeast, it is one and a half cents, and in the East, under passenger rate case 26550, the Interstate Commerce Commission prescribed a rate of three cents in parlor and sleeping

cars, and two cents in coaches. Later, the Eastern lines [fol. 348] made application for an increase, and they were given an increase to two and a half cents per mile on coach travel for an experimental period. That period expired on January 24 of this year, and they got an extension, and later the Interstate Commerce Commission considered their case, and they declined to further extend the two and a half cents; so on March 24, 1940, they will go to two cents per mile, the same as we are.

Q. Has permission been granted by the Interstate Commerce Commission to charge a higher fare in sleeping cars

than day coaches?

A. The Interstate Commerce Commission, as I say, set the three cents per mile as the maximum charge for transportation in parlor and sleeping cars, and a lower charge for coaches.

Q. And that applies with regard to interstate business in

Texas as well as any other place?

A. Yes, sir; we voluntarily reduced the passenger fares in western territory on December 1, 1933, to three cents for transportation, parlor and sleeping cars, and two cents coaches, we went to the Railroad Commission for the necessary authority to put in the same rate in Texas, and that authority was granted us.

Q. From your knowledge of this order of the Interstate Commerce Commission allowing the higher rail rate for [fol. 349] sleeping cars, do you know whether there is any provision that first-class fares may be charged only when an employee of the rank of Pullman conductor is in charge

of the car?

A. No, sir; there is no such provision.

Q. Are you familiar with the order of the Railroad Commission, found on page 79, which provides that no extra fares may be charged or collected by the railroads from passengers for the privilege of occupying Pullman sleeping cars unless facilities, employees, and supervision of employees, and cleanliness of cars is provided while en route?

A. I read that order, yes, sir, and am familiar with it.

Q. Are you aware of and have you made any study of the effect that would have on first-class fares that would result from that part of the order of the Railroad Commission?

A. Yes, sir; I have. In connection with certain of these line cars, as illustrated, we will take the Pullman line car 3010 operating over Gulf Coast line for the Missouri Pacific

between New Orleans and Houston. The current one-way fare applicable to passengers occupying Pullman and passenger cars is \$11.15. The effect of the order would be that a passenger occupying that car could not be charged any more than the three cents per mile fare to the first Texas point; and then the two cents per mile coach fare for the remainder of the distance, which would result in a total charge of \$10.06, or a reduction of \$1.09. Now, in reducing the fare between New Orleans and Houston \$1.09, that means that under Section 4 of the Interstate Commerce [fol. 350] Commission Act, any aggregate of these gateways would have to be taken up, and the rates reduced from other territories. That reduction would extend to Washington, D. C., the entire Southeast, through the New Orleans Gateway, and entirely equalized by other gateways where it is the regular custom of giving the public the benefit of the lowest rate by all routes; and then it would continue on beyond Houston to El Paso and on almost to the Coast. Well, it will probably go to Los Angeles.

Q. What do you mean by the gateway?

A. I mean this,—if the fare from Atlanta, Georgia, over to New Orleans would be equalized by Memphis, Tennessee, for example, to say, El Paso and points west by Memphis and Kansas City. And as you go further east, when you get to Washington, they would be equalized by the upper gateways, such as Chicago and St. Louis, and then the authorized route from there, which would be the ordinary route by which they carry the short-line fares from those gateways. Another case, we have a Pullman line 3370 between Memphis, Tennessee, and Dallas over the St. Louis and Southwestern. The first-class fare there is \$14.04 between Memphis and Dallas. The combination fare over the Texas border, using the first-class fare to Texarkana, and the interstate coach fare of \$3.71, would result in a through rate of [fol. 351] \$12.19, making a difference of \$1.85, so you have a loss of \$1.85 that carries on to the east, and the territory affected would be Washington, New York, Philadelphia, and New England territory to Dallas and to points beyond, El-Paso, and all the way to the coast. In fact, it would take out in almost every instance \$1.85 from that vast territory from coast to coast. Maybe in one or two instances, where the combination might run a little lower, like between New York and Los Angeles, the difference would only be 69 cents. That is due to the fare construction by other gateways.

Q. Do you have any other examples?

A. Well, we have now on that schedule—on that line 3251 you have an entirely different situation between St. Louis and Waco. The combination over Denison would result in lowering that fare to \$21.21, a difference of \$1.35. you cut St. Louis to Waco, it also cuts the territory north of St. Louis and the territory south of Waco. It reduces the fare. And Fort Worth to St. Louis, in the opposite direction, that same line car where you have from Fort Worth north-bound, you would have a rate made up by using the interstate Fort Worth to Denison, and then the first class rate, making \$19.43, as against the Forth Worth-St. Louis rate of \$20.29. The difference is 96 cents. At Kansas City you have a peculiar situation in regard to line car, Kansas City to San Antonio, known as line 3265. The one-way firstclass fare for transportation, parlor and sleeping car, is [fol. 352] \$23.19. It is the same in each direction; but southbound the combination there over Waco results in lowering the rate by \$1.87. North-bound, on account of the situation being a little different, the car being in charge of the porter all the way to Fort Worth, the difference is \$2.77. In that particular case, the chances are that the railroad would use their lowest rate in both directions, because it would be hard to separate as between the two.

Q. Now, going back to this line 3010 from New Orleans to Houston, with particular reference to the portion to Houston from the Sabine River, isn't there a competing railroad

that runs almost parallel to that?

A. Yes, sir.

Q. What railroad is that?

A. The Southern Pacific.

Q. And the Sunset Limited runs on that road?

A. Yes, sir.

Q. If there is a reduction made on the Missouri Pacific line between the Sabine River and Houston, wouldn't the Southern Pacific immediately reduce their rate?

A. Yes, sir; they would.

Q. They would meet the rate?

A. Yes, sir; the two lines carry the same fare. They carry the lowest combination there between those points, and that is the fare over both routes.

Q. And aren't there other lines that run parallel in the state of Texas where the same condition would exist? [fol. 353] A. Yes, sir; between Memphis and Dallas, the Missouri Pacific operates a car by Texarkana over the Texas Pacific. They would be obliged to meet the conditions created by the car over the Cotton Belt.

Q. How about the M. K. & T. and Missouri Pacific from

Fort Worth or Dallas down here to San Antonio?

A. You would have the same condition there where there are these other competing lines,—like take out of Fort Worth to San Antonio, the I. & G. N. have a car there, and

they would have to meet it.

Q. If you can ride for two cents a mile, or approximately that, in a Pullman car on the train where there is only a Pullman porter on the Pullman car, and the competing line would meet that rate on a train where they carried a Pullman conductor, wouldn't that, in turn, make the first railroad reduce to where their trains would carry that?

A. It would do that. The Katy is a fair example between

Kansas City and San Antonio.

Mr. Morgan: We object to that. It is wholly speculative,—what one railroad might do or another one might do.

Mr. Anderson: I withdraw the question. That is all.

#### Cross-examination.

# Questions by Mr. Morgan:

Q. Mr. Rogers, to ride in a chair car in Texas, a passenger is required to pay two cents a mile [fol. 354] A. That is the coach rate.

Q. Then if that same passenger desires to ride on the Pullman, he is required to pay to the railroad company an

additional one cent per mile?

A. He pays three cents per mile. The difference happens to be one cent, yes, sir.

Q. He pays three cents a mile, then?

A. Well, in Texas, of course, the statute rate is three cents a mile. The Railroad Commission, on their own initiative, reduced the coach fare to two cents a mile.

Q. They made application to the Railroad Commission

for the reduction?

They made application to the Railroad Commission, which they are obliged to do, whether it is an increase or a reduction that is sought.

Q. Now, then, they could make application, if they so desired, to change their rate to conform to this order, couldn't

thev?

A. They can make an application to the Railroad Com-

mission to make any rate they saw fit to make.

Q. Or they could just go ahead and comply with this order too, couldn't they, by simply having the Pullman Company furnish the Pullman conductor?

· A. I could not answer that. That is an operating matter.

I could not speak on an operating matter.

Q. You were speaking about those various rates and costs [fol. 355] there. Can you tell us whether or not it would not be cheaper for the railroads to require the Pullman Company to just go ahead and comply with this order?

A. I could not say about that.

Q. I will ask you this question, Mr. Rogers. You do know of your own knowledge that the railroads have not attempted yet to comply with this order, don't you?

A. Yes, sir.

Q. And you do know the figures you have given and results that those statistics show, that you gave, are purely hypothetical, aren't they?

A: The effect of compliance with the order would result

in these amounts.

Q. But so far as number of passengers who might ride on the train if they had a porter where they could ride for two cents, or a conductor in charge where they could ride for three cents, that is an untried matter about which neither you nor I would know what the public would do?

A. We really know what the public would do in time. They usually take advantage of the lowest possible rate for whatever class of service they are obtaining; we know that.

That is a demonstrated thing.

Mr. Morgan: That is all.

[fol. 356] Redirect examination.

### Questions by Mr. Anderson:

Q. Have the rail rates always been under the authority of the Texas Railroad Commission? A. Yes, sir.

Q. Wasn't there an order of the Interstate Commerce Commission in effect for a good many years which made these rate orders void?

A. When the Interstate Commerce Commission increased passenger rates in August, 1920, by 20 per cent, it raised the passenger fare from three to 3.6 cents per mile. The statute rate in the state of Texas was 3 cents per mile, and by reason of the fact there was a statute rate, that estopped the roads from raising the rate intrastate in Texas until we secured the necessary 13 section order, and after the level was increased in Texas eliminating the burden on interstate traffic.

Q. You spoke of Interstate Commerce Commission allowing a charge of 3 cents rail rate in Pullman cars. Didn't the Interstate Commerce Commission indicate approval of this 3 cents rate in Pullman cars because of the smaller number of passengers carried?

Mr. Morgan: We object to the question as to why the Interstate Commerce Commission did something. What motivated them is certainly not material.

Judge Sibley: I presume what they said would be proof of

[fol. 357] that. I think your objection is good.

Mr. Anderson: I believe that is all.

(Witness excused.)

A. C. Jackson, a witness called by plaintiffs, having been duly sworn, testified as follows:

Direct examination.

# Questions by Mr. Anderson:

- Q. State your name.
- A. A. C. Jackson.
- Q. State your business.
- A. Assistant general passenger agent, Missouri Pacific.
- Q. How long have you been so employed?
- A. Seven years in that capacity.
- Q. Where is your home?
- A. Houston.
- Q. How long have you lived in Texas?
- A. Since 1907\_

Q. You heard Mr. Rogers testify that there would be \$1.09 difference in an interstate rate where this particular part of the order having to do with the rate structure provides that no extra charge shall be made where the ear is manned only by a Pullman porter?

A. Yes, sir:

Q. That train has how many cars on it, Mr. Jackson? I [fol. 358] am referring to line 3010.

A. Four passenger-carrying cars.

Q. How many Pullman cars?

A. One.

Q. Is that a heavy or light line? Do you know anything about the passengers that are carried in that Pullman car?

A. In a general way, it is a local train—principally a local train.

Q. It makes a lot of stops?

A. Yes, sir.

Q. There is another road that runs parallel to your road from the Sabine River to Houston?

A. Yes, sir.

Q. That is the Southern Pacific?

A. Yes, sir; that is correct.

- Q. If you comply with this order by charging a coach rate on this train that carries one Pullman car in charge of a porter, what do you think the Southern Pacific is going to do about that?
- A. Competitive conditions would answer that. They would immediately meet our charge.

Mr. Anderson: I think that is all.

[fol. 359] Cross-examination.

### Questions by Mr. Culberson:

Q. Mr. Jackson, the questions that have been asked are whether the observance of this first provision of the order would have those effects upon the rates; that is to say, that part of the order which says that the rate shall not be charged unless the Railroad, in effect, compelled the Pullman Company to keep the conductors on the train?

A. That is substantially the order.

Q. If the railroad compelled the Pullman Company to live up to its contract, then you would not have that situation about the rate increase?

A. I don't know that the railroad can compel the Pullman Company to do that.

Q. Let's assume that they could do it.

A. I can't assume that.

Q. The order about which he interrogates you says that they shall not charge a rate unless Pullman conductors are furnished or unless supervision is furnished in accordance with the contract, and all of his questions assumed that you are going to observe that order?

A: Yes, sir; to avoid the penalty.

Q. Let's assume that you have a right to enforce it. Now, assuming the same things he did, and assuming that you do have the right to compel the Pullman Company to [fol. 360] perform the services which the Railroad Commission says it contracted to furnish,—that is, to keep supervision on these Pullmans, then you would not have this question of losing this revenue, would you?

A. First, let me say that I am not familiar enough with the contract to say whether that assumption can be had whether the railroad company can compel the Pullman

Company.

Q. The whole question is hypothetical on that assumption.

A. I answered his question on the basis, assuming we would be made to comply with the order of the Railroad Commission.

Q. He was interrogating you about the first order, I believe—which one was that?

Mr. Anderson: Page 79.

Q. He was interrogating you about this provision of the order,—"It is further ordered, adjudged, and decreed, that no extra fare shall be charged or collected by the railroad from the passenger for the privilege of occupying Pullman sleeping cars unless facilities and employees and supervision of the work of employees and the cleanliness of the cars is provided while the cars are en route, or as provided by the terms of the respective contracts with the Pullman Company, are fully complied with." He asked the previous witnesses what effect it would have on the revenues of the railroad if you were compelled to comply [fol. 361] with that provision of the order, and the testimony of the previous witness was that \$1.09 example. Now,

then, your answer is hypotheticated upon the assumption you could enforce that contract, and that it means what the Railroad Commission says. Now, I am asking you to make the same assumption and tell this Court if the same result will be had if you compel them to keep the conductors on the train.

A. I am not familiar with the contract.

Q. You are not familiar with the contract?

A. No, sir.

Mr. Graves: We can shorten this by admitting that if the Pullman Company put the conductors on the trains, this provision in respect to rates has no application.

Mr. Culbertson: That is all.

(Witness excused.)

[fol. 362] J. M. Vonau, Ja., a witness called by plaintiffs, having been duly sworn, testified as follows:

Direct examination.

### Questions by Mr. Graves:

- Q. Your name is J. M. Vonau, Jr.?
- A. Yes, sir; that is correct.
- Q. Where is your home?

A. Houston, Texas.

Q. You are in the employ of what railroad company?

A. Southern Pacific,—the Texas & New Orleans Company, commonly known as the Southern Pacific.

Q. How long have you been in the employ of the Southern Pacific Railroad Company?

A. Twenty-three years.

Q. What is your present status with the company?

A. My present title is assistant general passenger agent, specifically in charge of rates and tariffs.

Q. Are you familiar with the operations of the trains and the make-up of the trains of the T. & N. O. or Southern Pacific in the State of Texas?

A. Yes, sir; I am familiar in a general way, but as I stated, my specific duties are in connection with rates and tariffs.

Q. Does the Southern Pacific system have a train known as the Streamline train operating between Dallas and Houston?

A. Yes, sir.

Q. Is the train made up entirely of modern cars built on the streamline type?

A. Exactly.

Q. How many cars does the train carry?

A. The train carries five cars.

Q. What is the name of those trains?

[fol, 363] A. We have one that is operated as a non-stop in the evening,—the Sunbeam; and then a train in the morning with similar equipment that operates on a slightly slower schedule, known as the Hustler.

Q. Those trains make a round trip a day between Dallas.

and Houston?

A. That is right.

Q. What is the consist of the train?

A. Well, the Sunbeam non-stop train in the evening has three coaches, a parlor, and a diner, lounge, observation car.

Q. That diner, lounge, observation car is one car?

A. That is correct.

Q. So that it has five passenger-carrying cars?

A. That is correct.

Q. And how many head end cars?

A. One head end car-baggage car.

Q. A baggage car and five passenger-carrying cars?

A. Yes, sir.

Q. Does the railroad company own all of the cars in the train?

A. Yes, sir; it is railroad company equipment, so far as I know.

Q. So there are no Pullman cars on the train?

A. No, sir.

Q. Now, does the railroad company charge the first-class railroad fare to passengers riding in the parlor car?

A. Yes, sir; we charge three cents a mile, or a rate base

of three cents a mile in the parlor car.

Q. In other words, you charge the rate for riding in that parlor car that you charge on the Sunset Limited for riding in the Pullman cars on the Sunset Limited?

[fol. 364] A. That is right.

Q. Now, in addition to that, do you charge a seat fare?

A. Yes; we charge a seat fare. From Dallas to Houston, that seat fare is \$1.05.

Q. So that you make a charge that is equivalent to the first-class railroad rate, and then you make an extra charge

as the Pullman Company would make if that parlor car were owned and operated by the Pullman Company?

A. Yes, sir; and that is for extra advantages that that particular type of travel affords. For example, each passenger has a particular reserved seat, and also the use of that lounge observation car, and that has radio facilities and current magazines, and so forth,—a service over and above what the passenger gets who rides at the lower rate in the coaches or other cars.

Q. Just as the passengers in the Pullman car have sep-

arate seats assigned to them?

A. Yes, sir; they have space reserved in a Pullman car or parlor car. Each passenger is assigned a specific seat, and it is protected by the porter in charge, as I understand it, and their baggage and so forth is protected, and it is no question of having to sit in your seat all of the time to keep it. If you get up and then come back later that seat is still available to you.

Q. Who built those cars?

A. The name?

Q. Yes sir.

A. The Pullman Company as I understand it.

Q. They were built by the Standard Pullman Car Manufacturing Company?

[fol. 365] A. Yes, sir.

Q. The same company that builds the Pullman cars?

A. Yes, sir.

Q. Do you have an attendant on that parlor car?

A. Yes, sir; we have a special attendant in charge of that parlor car.

Q. Is he a colored man?

A. Yes, sir; so far as I know.

Q. Do you have also an extra conductor in charge of that car?

A. No; we have a train conductor in charge of the whole train.

Q. Now, you have passengers riding in a car, for which you get the first class railroad fare, and then for which you charge an extra charge for the seat in that parlor car, and yet you don't have a parlor car conductor, do you?

A. That is correct; we don't have a second conductor. We have a train conductor who has charge of the whole train, and he collects the transportation. Now, in that particular car the porter does not collect the transportation.

Our conductor collects the railroad transportation, and receipts their ticket, or if the passenger does not have the seat fare ticket he collects the seat fare charge.

Q. Have you had any trouble from the attendant in that

car mistreating or insulting any of your passengers?

A. Not that I know of.

Q. If any of the passengers on the car had been insulted

or assaulted you would know about it?

A. I think I would, because I am in the passenger service department and naturally when a criticism or complaint arrives it comes to the passenger service department, and [fol. 366] we try to keep informed of what is going on, and I have not heard of any trouble in that respect.

Q. Are there any other railroads that have such trains as that in Texas—trains that compete with the Sunbeam

and----

A. Yes, sir, there is the Zephyr train of the B. & R. I., that operates between Houston and Dallas.

Q. Do they have this modern streamlined equipment, too?

A. Yes, sir, so far as I know. I have never ridden them, but I have seen them, and I understand that is the kind of trains they are.

Q. Do you know whether they charge an extra fare for

riding in their parlor cars?

A. Their fares and charges are identical with ours.

Q. What railroad is it that operates the Zephyr?

A. The Burlington & Rock Island.

Q. Are those the only streamlined trains that you know of in Texas?

A. Yes.

Judge McMillan: The Burlington Railroad is not chartered in the State of Texas, is it? They have some connection with some other railroad, don't they?

A. That line is owned jointly.

Judge Allred: The Burlington does not come into Texas, does it?

Mr. Graves: It is operated by the Rock Island.

Judge McMillan: The Burlington is not a party to this suit, is it?

Mr. Graves: No, sir.

Judge McMillan: I don't think it is material then.

Q. Mr. Vonau, the Southern Pacific operates through trains between New Orleans and San Francisco and be-

[fol. 367] tween New Orleans and Los Angeles, and I understand you operate a train known as the Sunset Limited between New Orleans and San Francisco, and another train known as the Argonaut between New Orleans and Los Angeles?

A. Yes, sir; those are daily transcontinental trains.

Q. What special service do those trains render in the service of attendants that are not carried on the regular trains?

A. In each train we operate a lounge car for the benefit of standard sleeping car passenger, which offers barber service, valet service, shower baths, radio, free magazines, and so forth.

Q. Do each of those trains carry a number of Pullman cars?

A. Yes, sir, they do.

Q. They have one train conductor to each of the trains?

A. Yes.

Q. And one Pullman conductor?

A. That is correct.

Q. And a Pullman porter on each car?

A. That is correct.

Q. Now, then, if this train that operates between New Orleans and Oakland, California, that parallels the Southern Pacific line between New Orleans and Houston should reduce the railroad fare for passengers riding in this Pullman car, what would the Southern Pacific do in respect of the railroad fares for passengers riding on the Southern Pacific trains between New Orleans and Houston?

A. Well, immediately—

Mr. Lewis: We object to that as wholly speculative, something beyond his power or control.

Judge Sibley: I can guess, we can all guess from our [fol. 368] knowledge of how railroads operate; but it doesn't seem to me that it has to do with what we have to decide here.

Mr. Graves: I am not sure that it is an essential fact at all.

Judge Sibley: As I understand you, you say the Commission did not give you any notice of a rate hearing to begin with, and that part of the order goes out on that ground.

Mr. Graves: Yes, sir.

Judge Sibley: If you are wrong about this and it was within their power to make a new class rate—that is, two cents a mile—and they have a right to do it, they can do it.

Mr. Graves: If it was not unreasonable and arbitrary, but we would still have a right to complain about it in such

an action as this.

Judge McMillan: Does this order say that the rate shall be two cents a mile in the event there is no conductor; or does it say unless you comply with the contract it will be two cents a mile, and then goes on to construe the contract? It was a sort of round about way to get at it.

Mr. Graves: That is right, but we take it that none of the plaintiffs would be willing to run the risk of a penalty if that phase of the order should be applicable and should stand. They would not run the risk of the penalty for

violating it.

Judge Sibley: If you were to change your contract it would knock that part of the thing out, it looks like.

Judge McMillan: Is there anything in your contract to

require you to have a Pullman conductor?

Mr. Graves: No, sir.

[fol. 369] Judge McMillan: That is simply the Railroad Commission's construction of it.

Mr. Graves: Yes, sir.

Judge McMillan: To get back to your original question of whether or not other railroads would compete or not, how would that illustrate the power of the Commission or the reasonableness of what it did?

Mr. Graves: We think it would be a circumstance to show

it would be an unreasonable provision or requirement.

Judge McMillan: Any change they made in Texas rates would be the same thing. You would cut them off from changing a rate.

Mr. Graves: It would affect interstate rates inevitably

also. We don't care to pursue it any further.

Judge Sibley: It would constitute discrimination between railroads, because one might be complying with the Pullman conductor proposition, and if the other was not, it would require them to lower their rates to meet the competition.

Mr. Graves: I think it would. This is the last question

we had to ask this witness.

# Q. Did you answer the question?

A. Will you state the question once more, please, sir? As I recall it, you asked me if the Southern Pacific would feel compelled to meet the reduction in rates caused by the non-conductor operation on a competing line between New Orleans and Houston.

Q. That is right.

A. I would answer that, following rate policies and the policies that the railroads have followed for twenty years [fol. 370] or more, I would say yes, without qualification; and that would have to be made effective or we would make every effort to make it effective simultaneously with the line that reduced the rate.

Mr. Graves: That is all.

Cross-examination.

# Questions by Mr. Morgan:

Q. Are you familiar with the fares that are charged by your train going from Houston to Dallas and return?

A. Yes, sir.

Q. How much is that fare?

A. Well, it depends in which equipment you would want to travel.

Q. Let us say in the chair car.

A. We have a special rate of \$4.00,—a one way coach fare. That is in what we call a chair car coach.

Q. Is that one way or round trip?

A. That is one way.

Q. What is the round trip charge?

A. The round trip is \$6.00.

Q. What is the distance from Houston to Dallas?

A. On our railroad it is 263 miles.

Q. Do you know the fare that is charged on the Zephyr, to which the gentleman referred awhile ago, from Dallas to Houston and return?

. A. The fares are identical.

Q. Do you know that the same fare is charged from Fort Worth to Houston and return?

A. Yes, sir.

Q. Do you know that from Waxahachie, Texas, to Hous-[fol. 371] ton and back it is identically the same fare?

A. I think it is.

Q. You have three points of origin, either Fort Worth, Dallas, or Waxahachie, to Houston and return, and it is identically the same fare, isn't it?

A. Yes, sir.

Q. And from Fort Worth to Houston, is a distance in excess of 300 miles, isn't it?

A. On our railroad it is 285 miles.

Q. All right. Then you do have in that particular in-

stance special concessions as to rates?

A. Well, that \$4.00 rate we have is an experimental rate. We put it in last April on special authority from the Rail road Commission to meet highway competition,—that is the rate charged by the bus lines and we are trying to recapture some of our business from the highway.

Q. And in order to meet bus competition you are charging from Waxahachie, Dallas and Fort Worth the same

round trip rate the buses are charging?

A. We are charging from Dallas—the fact it is the same in Fort Worth is caused by the physical condition of other lines. We did not put the rate of \$6.00 in to Fort Worth. It was brought in by other lines.

Q. But you now have that rate?

A. Naturally we would meet the condition.

Q. If one wanted to ride your train from Fort Worth to Houston they would only have to pay \$6.00 for a round trip in a chair car?

A. Yes, sir.

[fol. 372] Q. Therefore you are charging just a fraction more than a cent a mile for travel on that round trip, aren't you?

A. Well, to Fort Worth it is about one and a half cents a mile. Between Houston and Dallas it is a little more than one and a half cents a mile by taking the shortest line, and that is the way rates are made. The rate would be \$3.70 on one and a half cent basis per mile, so you see it would be about one and three-quarters cents.

Q. Which company made a special request of the Railroad Commission as it applied to that particular operation?

- A. Our company did not make the special request. This is a rate that all the railroads operating between Dallas and Fort Worth and Houston attempted to test out. Mr. Rogers made that application in behalf of all the railroads interested in that traffic.
- Q. Do you know whether, of your own knowledge, your railroad has made application for an exemption as to the operation of the order in question as it relates to this specific train or any other train of your company?

A. I can't answer that question.

Q. Do you know?

A. No, sir, I do not.

Mr. Morgan: I think that is all.

Judge Sibley: We will recess until nine o'clock in the morning.

(The Court then, at 5:05 o'clock p. m., Monday, February 19, 1940, recessed until 9:00 o'clock a. m., Tuesday, February 20, 1940, at which time the following proceedings were had:)

[fol. 373] Tuesday, February 20, 1940

Morning Session: 9:00 o'clock

M. P. STRICKLAND, a witness for the plaintiffs, was sworn and testified as follows:

Direct examination.

Questions by Mr. Graves:

Q. Your name, sir, is M. P. Strickland?

A. Correct.

Q. You live in San Antonio?

A. I do.

Q. You are president of the Stowers Furniture Company?

A. I am.

Q. How long have you lived in San Antonio?

A. Off and on for forty-six years.

- Q. Have you had occasion to travel frequently or infrequently on railroad trains and on Pullman cars in recent years?
  - A. Yes.

Q. Frequently?

A. Frequently, yes.

Q. What has been your impression, Mr. Strickland, of the service rendered on trains by Pullman porters?

A. Satisfactory.

Q. Have you ridden on trains to which the Pullman car was accompanied by a Pullman porter but not a Pullman conductor?

A. I have.

- Q. Have you noticed any difference in the quality of service on those cars?
  - A. None.

[fol. 374] Q. From the others?

A. No, sir.

- Q. I will ask you to state whether you would have any hesitancy in permitting members of your family to travel on cars that were in charge of the Pullman porter and where there was no Pullman conductor present?
  - A. I would not.

Q. Where were you born?

A. I was born in Douglas County, Georgia, Lithia Springs.

Cross-examination.

# Questions by Mr. Lewis:

Q. Mr. Strickland, does it make any difference to you whether the train conductor ever goes into that Pullman car or not?

A. Not any particular difference. All he does is take up

your ticket.

- Q. If your wife were traveling by herself would it make any difference to you whether the train conductor ever went in that car or not?
  - A. It would not.
- Q. Regardless of whether there was a Pullman conductor in there?

A. No.

Q. Do you have any daughters?

A. No. I have a son ten years of age.

Q. Ten years of age?

A. Yes, sir.

Q. Would you prefer to put him in charge of a Pullman

porter rather than a Pullman conductor?

A. I don't think he would be in charge of either the Pullman porter or the conductor if he were riding in the car. [fol. 375] Q. If you put him in the car by himself would you prefer that there be a Pullman conductor there?

A. Well, I think perhaps I would prefer that there would

be a Pullman conductor.

Q. Why?

A. Well, I think that he would perhaps give him a little more attention. The Pullman porter has other duties, and perhaps he would give him a little more attention than the conductor—than the porter.

Q. And under many circumstances you would simply rather have the Pullman conductor there?

A. I can't say that I would.

Q. In case of disturbance you would, wouldn't you?

A. What do you mean by disturbance?

- Q. In the case of disturbance among other passengers you would feel lots better if there were a Pullman conductor back there, wouldn't you, if your little boy was riding in there?
- A. I have never been on a train when there was a disturbance. -
- Q. In the event of disturbance you would prefer that there be a Pullman conductor back there?
- A. If there was not a Pullman conductor there would be a train conductor back there.

Q. In the car?

A. I don't know that I-I think that perhaps he would be protected if there wasn't a Pullman conductor there, there would be other white men on the train probably. I seldom ride on a train when there are not other passengers, and usually the class of passenger that rides in the Pullman is a little better than that that would be on the chair car, perhaps.

#### [fol. 376] Redirect examination.

### Questions by Mr. Graves:

Q. What is your recollection as to how many Pullman cars there are on the train where there is only a Pullman porter there and no Pullman conductor?

A. Usually one Pullman car only. My experience has been between San Antonio and Laredo. I have ridden on that train when it was in charge of a porter.

Q. What has been your experience as to whether or not

the brakeman usually rides in that car?

A. The brakeman usually rides in the car. He is in and out of the car.

(Vitness excused.)

WILLIAM C. CLEGG, called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct examination.

### Questions by Mr. Graves:

- Q. Your name is William C. Clegg?
- A. Yes, sir.
- Q. You are a resident of San Antonic?
- A. Yes, sir.
- Q. A native of San Antonio?
- A. Yes, sir:
- Q. You are connected with the Clegg Company there?
- A. Yes, sir.
- Q. Mr. Clegg, have you had occasion to travel frequently in recent years?
  - A. Yes, sir.

[fol. 377] Q. On Pullman cars?

- A. Yes, sir.
- Q. What has been your experience and observation as to the service rendered on Pullman cars by the Pullman porters?

A. The very best so far as I know. I have never been inconvenienced any and I have been very comfortable.

Q. Have you traveled on cars where the Pullman car was in charge of the Pullman porter and there was no Pullman conductor present?

A. I may have. I don't recollect any particular case of

that sort.

Q. Have you ever seen any case of mistreatment or discourtesy to passengers by a Pullman porter?

A. No, sir, I don't recollect any.

### Cross-examination.

### Questions by Mr. Lewis:

- Q. Mr. Clegg, the Pullman porter shines your shoes at night, does he?
  - A. Yes, sir.
  - Q. And he makes up your bed?
  - A. Yes, sir.
  - Q. And he sweeps out the car?
  - A. Yes, sir.

Q. And does other menial tasks around in the car?

A. Yes, sir.

Q. If you were sending your wife on a trip or one of your children you would prefer to have another man in executive charge of that car rather than the fellow that does the menial tasks, wouldn't you?

[fol. 378] A. You mean for a long trip or a short trip?

Q. Well, first say a long trip.

A. I would think so.

Q. And correspondingly for a short trip, wouldn't you?

A. Well, it never occurred to me. I never weighed it any.

I guess so, yes, sir.

Q. You would feel just a little bit safer with your family in there with a white man conductor in charge of that car rather than in charge of a man who does those menial tasks, wouldn't you?

A. Yes, sir.

(Witness excused.).

C. A. GOETH, a witness for the plaintiffs, having been first duly sworn, testified as follows:

### Direct examination.

# Questions by Mr. Graves:

Q. Your name is C. A. Goeth?

A. Yes, sir.

Q. You are a resident of San Antonio?

A. Yes, sir.

Q. You are an attorney by profession?

A. Yes, sir.

Q. Mr. Goeth, how long have you lived in San Antonio?

A. About fifty years.

Q. Are you a native Texan?

A. Yes, sir.

Q. Mr. Goeth, have you had occasion to travel frequently in recent years on trains and on Pullman cars? [fol. 379] A. I have.

Q. Have you observed the quality of service rendered by

the porters on the Pullman cars?

A. Yes, sir, I have.

Q. Will you state whether it has been satisfactory or unsatisfactory from the standpoint of the passenger?

A. Very satisfactory.

Q. Do you recall whether you have ridden on Pullman cars that were in charge of a Pullman porter and where there was no conductor present?

A. Yes, sir.

Q. Have you noticed any difference in the quality of service rendered by the Pullman Company?

A. I have not.

Q. To the passengers under those circumstances?

A. I have not.

#### Cross-examination.

# Questions by Mr. Lewis:

Q. Mr. Goeth, if you were to go into a small, nice looking hotel and found that the porter was also in charge of that little hotel you would leave, wouldn't you?

A. That situation has never occurred to me. I can't say

whether I would or not.

Q. It is contrary to human nature that it should be a successful operation to place executive duties, or to place a man in charge who also performs the menial tasks of shiping your shoes and making your beds, isn't it?

A. It would be in some circumstances, yes, sir.

Q. When you go on a trip you purchase a Pullman ticket. Where do you buy that ticket as a general rule?

A. At the city office.

[fol. 380] Q. At the city office?

A. In San Antonio, yes, sir.

Q. Do you have any particular reason for buying it there rather than waiting to get it on the train? Is it just a matter of convenience?

A. A matter of convenience, yes, sir.

Q. The porters whom you find on the Pullman cars, do you think they would be satisfactory, transferred from those duties to that of selling the tickets?

A. Having the porter sell me the ticket?

Q. Yes, sir.

A. I don't think that would disturb me.

Q. To have him transferred to the town office where you buy your ticket?

A. That has never occurred to me. I don't know that that has ever happened. So far as I know, I don't think it has ever happened.

Q. What is the personnel of your family, how many

children?

A. Two.

Q. Boys or girls?

A. Boys.

Q. Do you have any grandchildren?

· A. Yes, sir.

Q. Boys or girla?

A. Two boys and one girl.

Q. In the case of a trip of say eight or ten hours and you were going to place your granddaughter or your other two grandchildren on the Pullman car, would you feel better about it if that car was in charge of a Pullman conductor rather than merely of a porter?

[fol. 381] A. I would not have the slightest concern if it

were only in charge of a porter.

Q. Would you depend somewhat on the train conductor in that feeling?

A. I would not.

(Witness excused.)

Judge Sibley: Is there any need of multiplying these witnesses, gentlemen? We have all ridden on Pullmans, and we know that no number of witnesses is going to change our ideas of what is going to happen, unless there might be some extraordinary circumstances.

Mr. Graves: We will defer to the Court's wishes, then,

Your Honor.

E. P. Burke, a witness for the plaintiffs, was sworn, and testified as follows:

Direct examination.

Questions by Mr. Graves:

- Q. Your name is E. P. Burke?
- A. It is.
- Q. What position do you hold with the Pullman Company?

A. Passanger traffic manager.

Q. How long have you been with the Pullman Company?

A. I have been with them for forty years.

Q. Do you know whether the Pullman Company has private cars?

A. They have.

Q. It-has a number of private cars that it furnishes on [fol. 382] on occasions when required?

A. They do, sir.

- Q. Now, the rates for the use of the private cars, how is that determined?
- A. They are part of the tariff on file with the United States Interstate Commerce Commission.
- Q. Does the tariff for the use of those cars contemplate the furnishing of a conductor with the car?

A. It does not. The tariff provides that a cook and two attendants will be supplied.

Q. Who for the Pullman Company files the tariff with the Interstate Commerce Commission?

A. I do.

Judge Sibley: Are these private cars sleeping cars?

A. They are, sir, and they also have living facilities, rooms, meals, those facilities.

Judge Sibley: This order mentioned sleeping cars.

- A. A private car in addition to having facilities for sleeping purposes, having rooms, has an observation lounge, dining room and cooking facilities. In fact, it is a complete living unit.
- Q. Now, then, as a matter of practice do you actually furnish a conductor with those cars when you furnish them?

A. We do not.

Q. Do they operate on trains where the other Pullman car or cars are in charge of Pullman conductors?

A. Frequently they are and frequently they are located in-[fol. 383] those trains ahead of the other cars, separated from the other cars so that there will be no disturbance of the occupants of the private cars.

Q. If they are located on a train where there is a Pullman conductor does the Pullman conductor have any supervision over that car, the private car?

A. He has none. There is no occasion for it.

Q. And if they are in a train where the Pullman porter is in charge of the one Pullman car on that train, I am speaking of the regular equipment.

A. Yes, sir.

Q. Does the Pullman porter who is in charge of the regular Pullman car have any jurisdiction over the private car?

A. He would have none.

Q. Is that a copy of the tariff that you speak of?

A. These are pages of the tariff that govern the private car rates of the Southwestern section of the country.

Q. Give us the short name of the tariff?

A. Southwestern section rate book, tariff, I. C. C. No. A-12.

Mr. Graves: We offer this in evidence.

Mr. Lewis: If the Court please, may we ask this witness a question with reference to this to see whether it is admissible or not?

Judge Sibley: Yes, sir.

### Voir Dire by Mr. Lewis:

Q. Are the cars that you are speaking of known as sleeping cars or included in sleeping cars, when you speak of sleeping cars?

A. They are known as private cars. They contain sleep-[fol. 384] ing car facilities and as such would be a part of the sleeping car facilities of the Pullman Company.

Q. When you mention sleeping cars would it include these cars?

A. I would say it does because they have sleeping facilities and they are a part of the Pullman Company equipment and the rates are governed by the tariff.

### Questions by Mr. Graves (resumed):

- Q. Are these cars operated in Texas as well as out of Texas?
- A. There have been movements of those cars in Texas. I understand that in one year there were eleven such movements either into, out of, or through the State of Texas.

Judge McMillan: Where do these three employes sleep

on this private car?

A. There is a small head-end section where they live and where they prepare the meals.

Judge McMillan: If you put a conductor on would there be

a place for him to sleep?

A. No, sir. They are very limited quarters, naturally, with the idea of giving as much space as possible to the party chartering the equipment.

Judge McMillan: Who lifts that transportation for the

Pullman Company and the railroad?

A. It is usually paid for in a lump sum in advance. Usually an arrangement is made with the Pullman Company and the railroad company for all collections, that is, including not only the transportation but also parking charges and service charges during the stops at the places where the car is stopped over.

Judge McMillan: You don't have any regular private [fol. 385] car routes, it is just a hit or miss proposition?

A. Yes, sir.

Judge McMillan: You might have one tomorrow and you might not have another one for some time?

A. That is true.

Judge McMillan: Would those cars be used by land companies and so forth?

A. No, sir, by people that would like to have exclusive service, a little above what would be available in a regular train or where their movement takes them to a spot where they couldn't get desirable accommodations on the regular train.

### Voir Dire by Mr. Lewis (resumed):

Q. Are those the cars that are referred to in this exhibit here as composite cars?

A. No, sir, you will find those rates at the top of page seventeen of that tariff A-12 under section four, headed "private car per diem rates."

Q. These, then, would be private cars rather than the

standard sleeping cars?

A. Yes, sir,

Q. Do you have to get special permission each time one of these cars operates, from the Railroad Commission?

A. No, sir, the rates are permanently filed. They are a

part of the tariff.

Q. Have you applied to the Railroad Commission for an exception to this order with reference to this character of cars.

A. I know of no application to the Commission. You refer, may I ask, to the state Commission of Texas? [fol. 386] Q. Yes, sir,

A. No application has been made. Our tariffs are not on

file with the Texas Commission.

(Thereupon the above referred to document was received in evidence and marked Plaintiffs' Exhibit No. 6.)

(Witness excused.)

Mr. Graves: In view of the Court's intimations, I think we are through except for one thing. We have some affidavits that cover two subjects. One group of affidavits cover the subject of the make-up of these trains, what these railroad men call the consist of the trains. The other group of affidavits cover the subject of the difference between the revenues that would annually be taken in by the railroads involved in this suit if they applied to the coach rate, the average coach rates to the passengers in the Pullman cars instead of the first class rates that are now applicable. We are preparing now, by an understanding with opposing counsel, an excerpt from those affidavits, with a view of condensing the record on that subject, and we will have it ready by noon; and with that understanding we will rest.

Judge Sibley: All right.

#### [fol. 387]

#### DEFENDANT'S EVIDENCE

M. B. Cunningham, a witness for the defendants, was sworn and testified as follows:

Direct examination.

### Questions by Mr. Morgan:

- Q. You are M. B. Cunningham?
- A. Yes, sir.
- Q. You live in Fort Worth?
- A. Yes, sir.
- Q. How long have you been working for the Pullman Company as a conductor, Mr. Cunningham?
  - A. Thirty-five years next month.
  - Q. You say thirty-five years?
  - A. Thirty-five years.

Q. What various roads have you run on? Briefly outline them.

A. All the roads in Texas that carry sleeping car equip-

ment.

Q. All the roads?

A. All the roads.

Q. What is your run at this time?

A. On the Katy Blue Bonnet, Fort Worth to Kansas City.

Q. How often do you go out on that train, Mr. Cun-

ningham?

A. Every three days.

Q. Have you been continuously in the service of the Pullman Company as a conductor for thirty-five years?

A. I have.

Q. You are one of the intervenors in this suit, are you not?

A. Yes, sir.

Mr. Graves: He is an intervenor defendant, as I understand.

Mr. Morgan: Yes, sir. There are two groups of intervenors.

[fol. 388] Mr. Graves: Yes, sir.

Q. Now, Mr. Cunningham, are you familiar with the rules and regulations of the Pullman Company as promulgated for the use and instruction of Pullman conductors?

A. Yes, sir.

Q. Do you have one of their little books that are furnished to Pullman conductors?

A. Yes, sir.

Q. Do you have that with you?

A. Yes, sir.

Q. Is that the same book that was offered here in evidence yesterday on behalf of the plaintiffs, as instructions to conductors?

A. Yes, sir.

Q. I have forgotten the exhibit number, but that is identically the same book?

A. Yes, sir.

Q. Have you, in your experience, had occasion to attend the schools that are had for the conductors?

A. Yes, sir.

Q. Where do you attend those schools, Mr. Cunningham?

A. In Fort Worth.

Q. Are those schools attended by the Pullman conductors in that area?

A. Yes, sir.

Q. Are they likewise attended by the porters in that area?

A. Yes, sir.

/ Q. Do you attend the same schools?

A. No, sir.

[fol. 389] Q. You attend separate meetings?

A. Yes, sir.

Q. But you do know there are schools for the porters?

A. For the porters, yes, sir.

Q. Now, Mr. Cunningham, on this question of schools that are had, how long do they usually take?

A. Well, anywhere from an hour, probably, to an hour

and a half.

d.

Q. How often are they?

A. They try to get through in an hour's time.

Q. How often are they held?

A. Quarterly.

Q. Four times a year?

A. Yes, sir.

Q. Four times a year?

A. Four times a year.
Q. Now who attends those schools as instructors?

A. Well, in Fort Worth we have three that are instructors. One is the district superintendent, and his assistant. We have a safety supervisor that attends to the safety measures.

Q. What subjects are studies at these meetings?

A. Service in general and safety.

Q. All right. In addition to that does the company cause to be issued certain bulletins for the Pullman conductors?

A. Yes, sir, special bulletins that are posted in a bulletinbook.

Q. Are those issued at any given intervals or just periodically?

A. At periodical times.

Q. There is no set time for that?

A. No.

[fol. 390] Q. Are those bulletins likewise furnished to the porters?

A. Yes, sir.

Q. All right. Now, then, when you talk about supervising service as a Pullman conductor, will you please tell the

Court just what you do, what a Pullman conductor does when he is supervising the service?

A. Well, he has various and numerous duties to perform.

Q. All right, what are they? That is what I want.

A. He has to look out after the air conditioning equipment; look after his porter to see that his porters are in uniform and the proper uniform and that they are in a clean condition, the uniforms are clean and neat looking. He has to look out after the cars, see that the cars are in shape to go out on the lines.

Q. All right, what else, if anything?

A. Well, everything that comes under that category. He has to see to everything.

Q. All right Now, how about the passengers? What if

any service do you render to the passengers?

A. Why, I render the service of taking care of passengers. I have passengers put in my care sometimes at the station before I leave. Sometimes old people and sometimes children and girls. Those are looked out after to see that they are taken care of, to see that they get their meals served in the sleeping car if they are too feeble to go to a dining car or not able to go to a dining car.

Q. All right, how about the sanitation of the car? Who

is responsible to see that it is properly cared for?

A. The Pullman conductor.

Q. Mr. Cunningham, are you familiar with the sanitary [fol. 391] code provided by the statutes of Texas?

A. I am.

Q. Whose duty is it to see that the sanitation of the Pullman car is properly provided for?

A. The Pullman conductor.

Mr. Graves: Just a moment. Is he speaking now about when a Pullman conductor is on the train or when there is no Pullman conductor on the train?

Mr. Morgan: When a Pullman conductor is on the train, Mr. Graves.

Mr. Graves: All right.

Q. Now, then, you say that it is your responsibility about air conditioning. What instructions do they give you about air conditioning? You haven't had that but about three or four years, have you, Mr. Cunningham?

A. I think it has been about four or five years.

Q. What special instructions, if any, do you receive about that?

A. Of course, we don't have any instructions in regard to the mechanical part of the air conditioning equipment. We couldn't correct a mechanical error. We have instructions as to how to control the air conditioning on the inside of the car at what is known as the control panel. We have certain temperatures for day time and certain temperatures for night time. We are supposed to use a day time temperature, a temperature for day time only, and not night temperature, and vice versa with the night temperatures. In the event of a failure in this air conditioning. cars getting too hot when it is supposed to be comfortable. or cool, we have to go then and see what is the trouble. There is a red light on that board that flashes, usually will flash when there is any trouble in the line, but I have known [fol. 392] occasions when the red light didn't flash and we would have to go hunt for it otherwise. I have found times when the car was heating in the summer time, and have gone and found a stuck valve. Well, you can go to your control panel and find out where those valves are located and go look and see whether it is on or off, on an on or off position. If it is you can sometimes adjust that by shaking the lever backwards and forwards and it will pick up and start again.

Q. All right.

A. And you might say that the Pullman conductors on the cars are held strictly accountable for man failures, what is known as man failures. That is something that they can correct, that they should know, according to their instructions, and if carried out they could prevent.

Q. All right, what experience, if any, have you had with the porters leaving the ladders in the aisles, stools in the

aisles?

A. Porters have a little short ladder that they use in making down berths. They use that little ladder in order to climb up so they can hook the curtains over the curtain rods and for other purposes for which it might become necessary to use it. There are some porters that will leave that ladder standing in the passageway or the aisleway opposite the berth they are making, propped up against the head board, or I mean against the end of the other berth across in the opposite section. The conductor has to look and see that those aisleways are kept clear of

those ladders. There is danger of passengers passing through the car and tripping over it. The instructions are to fold that ladder and place it back under the berth that he is making.

Q. All right.

[fol. 393] A. Take the longer ladder which is used for climbing into the upper berths. The porters will carry those ladders sometimes to a passenger that is wanting to get into the upper berth, and in place of carrying it back to the locker and placing it in the locker he will leave it standing up against the bulkhead at the end of the car, which is contrary to instructions. The ladder is liable to fall and slip down against some passenger coming through the car.

Q. You are not suggesting to the Court that every porter

does that all the time?

A. No, sir.

Q. Does that occasionally happen?

A. That occasionally happens, yes, sir.

Q. Is it the duty of the conductor to supervise that service and see that that isn't done?

A. Yes, sir.

Q. What about the linen room, is it your duty to supervise that?

A. The which?

Q. The linen department.

- A. No, we don't have anything to do with the linen. Of course, if we see a porter starting to make down a berth with linen that is marked or soiled or doesn't seem to be suitable or in an insanitary condition, we would stop him and have him use different linen.
- Q. All right. Now, Mr. Cunningham, in your many years of experience have you ever had any personal encounters with a Pullman porter?

A. Yes, sir.

Q. Just briefly tell the Court what happened and on what occasion?

[fol. 394] A. Well, one evening as we were leaving Galveston some years ago I had a price on the car and the porter seemed to be in kind of—just not quite himself, like he might have been drinking. I called the Pullman's agent's attention to it at that time, who happened to be on the platform. He said to the porter, he said—

Q. Never mind what he said. Just let's get along.

A. Well, we were receiving the passengers for the car, and that was the car that was closest to the station. Of course, I worked back at that car so that all passengers who came back I could direct them to the different cars in the train. I had three different cars. After we got out of town—

Q. That was out of Galveston?

A. Yes, sir. I went forward and started at the front end of the car and worked back. Not with the train conductor. I lift railroad transportation and also Pullman transportation. I worked back through the cars until I got back to this last car that the Pullman porter was in that looked like he had been drinking. There were no passengers in this car with the exception of the Pullman agent from the Galveston district. He was sitting at the back end of the car in one section back of the section where this porter was making down a berth. As I came along I noticed the porter climbing up on top of the arm rest and seats to unhook the curtain rods in the upper berth, that is for the upper berth, to put the rod in position. I said something to him about it. I was asking him if he didn't have a short ladder or box or something to stand on instead of climbing up on those head rests or arm rests. He didn't say anything in reply, but turned and struck me in the top of the head with a berth key. [fol. 395] Q. With a what?

A. A berth key.

Q. One of those big keys used to open the berths with?

A. Yes, sir, a heavy instrument used to open berths. This blow was struck with force enough to knock me on my back in the section opposite, and when he struck me I fell in this section opposite. Mr. Magden got up and came forward and tried to get hold of the porter to separate him, get him off me, and in the—in his efforts to get the porter away from me he got blood on the front of his coat, his clothes, and when I finally did get the porter off me, why, my head was bleeding quite a bit, blood was all over my clothes.

Q. Were you carried to the hospital, Mr. Cunningham?

A. After I got to Forth Worth the next morning I went to the hospital and had several sti-ches sewed in my head.

Q. And was the porter tried for that?

A. The porter was arrested and taken off the train at the first stop and tried in the Galveston-County Court and given three years, a three year sentence.

Q. Now, Mr. Cunningham, I will ask you if you have had any experience in the handling of conventions? Have you had any experience with that?

A. Yes, sir.

Q. Did you ever handle a bunch of cattlemen on cattlemen's conventions?

A. Yes, sir, I used to have those, quite a good many of them. I had one in particular I remember about. I had, I think, three or four extra cars that trip on the breaking up of that convention in Forth Worth, and I had one porter in there, I had gone to the cars before the cars were ready to leave, before we were ready to receive passengers, and I had [fol. 396] gone through to see how the porters were, if they were on the job. So I had one porter that said he knew all about how to handle this business, cowboys, so I said all right. So after the train was ready to leave town I went back, and the train left, and I started working on my last car and worked forward, and just as I got through working that car and stepped into the vestibule I heard a commotion coming through from the other car, a passenger said, "Let me to the black son-of-a-bitch, let me hit him." And the porter rushed out into the vestibule and he had on a white jacket and blood was running down on the white jacket and he had a red front on him, so much blood. He run behind me and said, "Conductor save me. Don't let them hit me anymore." So as they come through the door I raised my hand up and said, "Gentlemen, what is the trouble?" And they said, "We asked that black son-of-a-gun to do something in there and he said he would do it when he got ready." and he said. "we proceeded to make him do it."

Q. All right, that was a bunch of cowboys out of Fort

Worth?

A. Cattlemen and cowboys out of Forth Worth.

Q. All right, Mr. Cunningham, did you ever have any men on the train that tried to make improper advances toward the !ady passengers on the train?

A. I have, yes, sir.

Q. Well, just tell us an experience of that sort.

A. I had one occasion in particular. That was out in El Paso some years back, quite a few years ago. Now, there was a lady on the car, she was kind of a timid natured lady, didn't seem to be a seasoned traveler or anything like that. There was a man on the car that was in the section right

close by, just behind her. I think he came along and smiled [fol. 397] and he sat down in the seat in front of her and talked awhile, and finally he got over on the seat by the side of her, and he annoyed the lady so much that she had to have her berth made down and go to bed. This was along about six o'clock in the evening. The next morning she got up and went to the dining car and it was the same old story over again. Finally I had to intervene. The next morning I went and asked the lady if she hadn't been annoyed by the passenger. She said she had. So she said she wished I would do something about it.

Q. All right, what did you do?

A. I went to the gentleman and told him that he would have to leave the lady alone, that she didn't care to have any more conversation with him, she was being annoyed and he would have to leave her alone. He threatened to report me to the Pullman Company for exceeding my authority. So I agreed with him that he had a perfect right to do so. But he never did make any report.

Q. All right, what experience, if any, have you had with porters while on duty becoming intoxicated, Mr. Cunning-

ham?

A. I had one case of a Fort Worth porter, who is still in service today I might add, on a Santa Fe train. We had a drawing room of passengers, I think about three of four gentlemen. These gentlemen were playing cards and drinking. In fact, they drank a long way into the early morning hours. The porter was serving them, taking care of them in the way of getting ice and stuff for them. I saw how things were going. I cautioned the porter to be careful, not to go too far as to happen to take a drink of any of the liquor they had there because he might get in a condition where he [fol: 398] wouldn't be able to serve the passengers. In the same car I had a man and a woman that were trying to get 'acquainted, and finally did get acquainted to a certain extent that I thought there might be something otherwise than just a mere acquaintanceship. I also instructed this porter when I went to bed to be sure and look out after that situation. So I retired about the usual time, and after about two hours I was awakened by some commotion or talking outside, and I looked out over the curtain rod from the upper berth and I could see this man coming out this woman's berth that were getting together the night before. This porter just about

the same time came reeling down the aisleway of the car drunk. I got back, got up immediately and put my clothes on and got back on the job and stayed on the job from there on into Kansas City. On my diagram for that half of the morning I made a notation that my rest period was cut two hours short on account of a drunk porter. The Pullman Company paid me two hours extra time.

Q. Now, you say that during that time, was that the time you were supposed to be resting or were supposed to be in

bed sleeping, Mr. Cunningham?

A. Yes, sir.

Q. Conductors do have on these long runs—you have rest periods?

A. On my long runs I have four hours.

Q. And likewise the porters have rest periods?

A. They have four hours.

Q. And during that time you say you saw this man climbing out of the berth of this lady?

A. Yes, sir.

Q. Now, was it the duty of the porter to have charge of the [fol. 399] car during the time you were asleep?

A. Service-in a certain way, yes.

Q. I mean supervise such services as that?

A. Oh, yes; yes, sir.

Q. All right. Now, Mr. Cunningham, have you had any experiences of men on the train wanting to buy drawing rooms for the purpose of occupying those with ladies they have met on the train?

A. Yes, sir, it was just a few months ago on this run to Kansas City I had two passengers, a gentleman and a lady in the car that came in from San Antonio, and they went to the lounge car after leaving Denison and became acquainted up there, and the man came back into the—as we pulled out of Denison I went up through the lounge car and I saw this gentleman and lady drinking, and then later about 11:30, I think probably, this man came back into the other car where I was sitting and said he would like to have the drawing room if he could get it. I said, "Why, certainly you can get it; you will have to have an extra fare railroad ticket, though, and then the difference between the single occupancy rate of the drawing room and your lower berth rate charged you too"; and he said, "Well, we have got another ticket." I said, "Where is it"? He said, "Up here in the lounge

car." I said, "You mean the lady that you have been sitting there drinking with?" He said, "Yes." "Well," I said "There won't be anything doing in that respect." So he said I shouldn't see so much. I said, "That's what I'm here for."

Q. Well, did he offer to tip you?

A. No.

[fol. 400] Q. What about tipping—is that a custom that prevails on Pullman trains with reference to the conductors; are they ordinarily tipped Mr. Cunningham?

A. You mean for purposes of that kind?

Q. Yes, sir, or any other kind.

A. No.

Q. The Pullman conductors are never tipped, are they?

A. No.

Q. What about Pullman porters?

A. Pullman porters are tipped, yes; it is part of their salary.

Q. All right.

Mr. Graves: We ask that that last statement be stricken. It was not responsive to the question, and it is a conclusion on his part.

Judge Sibley: He could not have meant it accurately because the company does not pay it. I guess he meant that it is part of their income and that they expect to get it. That is common knowledge.

Mr. Graves: Yes, sir, and we recognize that.

Q. Now, Mr. Cunningham, you are Vice President of the Order of Sleeping Car Conductors, aren't you?

A. Yes, sir.

Q. You were here in attendance, of course, yesterday and saw all of these Pullman porters who came in here to testify?

A. Yes, sir.

Q. Is there any controversy, Mr. Cunningham, between the Pullman conductors and Pullman porters?

A. None whatever.

Q. You gentlemen are not angry with the Pullman por-[fol. 401] ters, are you?

A. No, sir, we have no fight with the Pullman porters.

Q. In the main, do you find the Pullman porter to be pretty high-classed colored men?

A. We do.

Q. But you do find these exceptions which you have outlined here?

A. We do find exceptions, yes.

Q. Well, do you find that the porters, just the rank and file of porters, whether or not they are careless oftentimes in carrying out their assignments on the cars?

A. Yes, sir, some of them are very careless.

Q. Now, what experience, if any, have you had with reference to sanitation on the car, Mr. Cunningham, and par-

ticularly with reference to the way the porters—

A. Well, sanitation is one thing we look out for very carefully because there is a lot that depends upon sanitation and. how the car is taken care of, especially if you have some contagious diseases in the car; if you have something of a contagious nature, why, they have to be-if it is a very bad case they have to be isolated in the drawing room in charge of a nurse; but sometimes we have cases like tuberculosis which are in the car-in the body of the car. A berth that has been sold to a tubercular passenger has to be condemned and not put on sale until the car reaches the terminal, where it is fumigated. Then the berth is left down, you might say, not even put away and locked up; it is left down so the bedding, the sheets and the pillows and blankets can air out and the curtains are buttoned across so it won't be unsightly to the passengers in the car. Q. I see. [fol. 402]

A. In the other part—in the smoking rooms the porter frequently has to clean the smoking room and the smoking room floors and look into the closets and clean them. He is supposed to take his mop and use a bucket and mop those floors and use formaldehyde as a deodorant in those closets; and he mops up his smoking room floors quite frequently throughout the day and before retiring at night. There is one practice that a good many porters have which has caused a great deal of inconvenience on the company's side, and that is dipping his mops in the hoppers and scouring the floors.

Q. By that term, you mean that they dip the mop into the commode, is that what you mean?

A. Yes, they dip the mop into the commode.

Q. Yes, sir.

A. It looks as if they are clean but germs are there nevertheless; it cover a floor and whenever it dries you have a bad condition.

Q. Yes, sir. Now, have you ever known of a case where they used too much of this disinfectant?

A. Yes, sir, I had one porter one night that had some passengers in a smoking room and he wanted to go to bed; it was getting along after his bedtime, and he wanted to go to bed; so he takes a bucket of formaldehyde and wets the floor and scours around with it and in a very few minutes they all got up and went to bed. I walked in a very few minutes afterwards and the air was so full of formaldehyde it made my eyes smart and sting; he said he wanted them to go to bed and they sure moved out when he put that on the floor.

[fol. 403] Q. Mr. Cunningham, in the event of a wreck on a train whose duty is it to take care of the passengers on the Pullman car?

A. The Pullman conductor's.

Q. What instructions, if any, are you given by the Pullman Company with reference to your assignments in the

event of such a catastrophe?

A: Give all the aid you can to those passengers that have been injured or wounded; if necessary, take blankets out of the car, and tear up sheets and make bandages out of them—pillow slips or sheets, and make—if the car is turned over you have to take the passengers out and you can take the mattresses out there and lay them on the ground so you can lay the wounded passengers on these mattresses.

Q. Have you ever been unfortunate enough to be in a

wreck, Mr. Cunningham.

A. Yes, sir.
Q. On one or more occasions?

A. Several, yes, sir.

Q. Mr. Cunningham, in your long years of experience as a Pullman conductor, are you familiar with the plans that are worked out between the Pullman conductors on the one side and the Pullman Company on the other side, with reference to rearranging schedules and pooling runs for conductors?

A. Some, yes, sir.

Q. Will you please tell the Court just how this pooling is done? By pooling you mean rearranging schedules to use up the hours of the conductors. Will you tell the Court [fol. 404] just how that is done?

A. Why, by taking two runs and pooling them together. Two one night runs of less than 14 hours total elapsed time cannot be pooled, but a run of 14 hours or more total elapsed time can be pooled with the shorter run; in that instance if you had conductors on a run of 14 hours or more, you could pool—and they did not make the 240 hours each month, you could pool those conductors with the shorter run and consume all the hours less than 240 hours.

Q. And all of that time up to 240 hours would not cost

the Pullman Company any additional charge at all?

A. No, sir, no.

Q. If you worked more than 240 hours, then what additional pay, if any, would you receive?

A. You would receive the extra rate—that is, the extra

service, extra time at the hour rate.

. Q. Well, now, let's be specific, if we can, and illustrate with one particular run to show how this pooling or rearranging of schedules would operate.

A. Well, there is one particular run which we will use as it stands now in Fort Worth with the line that I am on. We make 220 hours per month, that is figuring on an 8 hour day with 30 hours (days) a month? There is three conductors on that line.

Q. That leaves 20 hours per month of time for each conductor that is not used in service?

A. For each conductor that is not used. Now, then, we have a little short run down to Ennis. The conductors that come in on that run come in and are released at 8 o'clock one morning and do not report until 5:15 the second after-[fol. 405] noon. The conductors on those runs could make the trip down to Ennis and back and have all day in Fort Worth after his run from Ennis; he would have all day in Fort Worth from 8 o'clock in the morning until 10 o'clock at night on his outbound trip. They could be pooled together with something like about 15 hours of excess time to each conductor.

Q. All right. Now, have the conductors in the past, and are they at this time ready to cooperate with the Pullman Company in rearranging these schedules and pooling these runs, not only at Fort Worth but at Dallas and at Houston and all over, in order to comply with the requirements of this particular order?

A. Yes, sir.

Q. And as far as the conductors are concerned they are perfectly willing to change their own schedules and rear-

range them and pool them so that those runs that do not have conductors may have conductors?

A. The conductors do not have any control of their sched-

ules.

Q. I understand.

A. Schedules are made by the Company.

Q. Don't you have an operating agreement between the conductors and the Pullman Company?

A. Yes, sir, we have an operating agreement, but not as

to individual schedules.

Q. Well, I understand the final determination of the matter is left to the discretion of the Pullman Company, and they can ultimately say whether they want to do this or not do it.

A. Absolutely, yes, sir.

[fol. 406] Q. All right. Now, have you known of the Pullman Company being required to employ any additional conductors to take care of different changes that have been made by the various regulatory bodies throughout the years?

A. No. I haven't.

Q. Do they employ additional conductors or has it been the custom in the past for them to rearrange the schedules and pool the schedules of the present conductors in order to take care of this extra work, if any?

A. That has been the practice, yes, sir.

Q. Now, Mr. Cunningham, what do you find from your experience on the trains today with reference to the drinking of intoxicating " wors?

A. Well, the amount of drinking is on the increase on the trains I am on. I can't speak for other trains; only the ones

I am on.

Q. I understand, but on the trains you are on you say it is on the increase?

A. On the increase, yes, sir.

Q. You mean there is more drinking today than you have ever known before at any time?

A. Yes, sir.

· Q. How often would you say to the Court that you encountered some man or some lady who has had too much to drink on your run?

A. Well, it seems like almost every trip. There may be a trip or two occasionally that there isn't someone drinking

either in the lounge car or in the Pullman car.

Q. Mr. Cunningham, has there grown up a custom or [fol. 407] does there at this time exist—in the last few years the custom of some of the lady passengers on the train drinking as distinguished from formerly?

A. Yes, sir, there's almost as many lady passengers drink-

ing nowadays as there are men.

Q. That same condition formerly didn't exist, did it?

A. No, it didn't exist before.

Q. Now, does that cause any additional difficulties in maintaining proper decorum on the cars?

A. It does, yes, sir.

Q. From your experience in dealing with the porters, Mr. Cunningham, have you found that they are able to handle a white lady, let's say, when she has had too much to drink?

A. Well, they never handle them when I am on the train. I can't imagine how they could handle a situation of that kind.

Q. You always personally attend to matters of that kind?

A. Oh, yes, sir, yes, sir.

Q. Now, Mr. Cunningham, is it a part of your duty as conductor to assign space to passengers who get on the cars?

A. Yes, sir.

Q. Of course, you make out your diagrams?

A. Yes, sir.

Q. And the Pullman porters shine the shoes and carries the baggage in and out and does the menial labor that is done?

. A. Yes, sir.

[fol. 408] Q. Now, Mr. Cunningham, what experience, if any, have you had with reference to taking over Pullman cars that have been in charge of a porter in charge when you come on your run and find that the porter in charge, with reference, particularly, my question is directed to the sanitary condition of the car?

A. On my trip northbound I pick up a car that has been in charge of a porter from Oklahoma City to Parsons; that car is picked up along about 4 o'clock in the morning, and I don't get back into this car until along about 6:15, and the car—as a usual thing the car is in a very nice condition when I get back into it. So I can't say very much about that particular matter.

- Q. All right. You haven't had a great deal of experience on that, then?
- · A. No, sir.
- Q. Now, Mr. Cunningham, I will ask you if this custom is on the increase of decrease of men and women becoming familiar or more familiar on the train—is that custom on the decrease or increase at this time?

A. Well, I wouldn't say it is on the increase; we have always had those conditions.

Q. Well, with reference to the other conduct of passengers.

do you find more of that now than you used to?

A. There seems to be more of it now than usually because of the drinking in the cars. Why, with the drinking there is more familiarity than before.

Mr. Morgan: I think that is all.

[fol. 409] Cross-examination.

# Questions by Mr. Graves

Q. How long did you say, Mr. Cunningham, you have been in the employ of the Pullman Company?

A. It will be 35 years in—it will be 35 in July.

Q. With reference to this incident where the porter attacked you out of Galveston, Mr. Magnon was the Pullman agent who was on the train at the time?

A. Yes, sir.

Q. He is dead, isn't he?

A. I don't think so. He is retired and living in Houston.

Q. You don't know that he is dead?

A. No, if he is dead, I don't know it.

Q. When was that, Mr. Cunningham?

A. In 1928 or 1929.

Q. You are sure it was not in 1925?

A. No, it was not in 1925.

Q. It was not in 1925?

A. No, it has been since that time.

Q. You, of course, draw a distinction, Mr. Cunningham, between these colored men that have good characters and the others that do not have good characters?

A. Oh, yes, sir; we have got plenty of porters that are good porters, all right.

Q. How is that?

A. I say we have got plenty of porters that are good porters.

Q. How much special training does a Pullman conductor

get before he is put in charge of a run?

A. He has ten days instruction on the road with another conductor.

[fol. 410] Q. 10 days instruction on the road?

A. Yes, sir.

Q. As a kind of an apprenticeship?

A. Yes, sir, he serves an apprenticeship; yes, sir.

Q. And he gets paid during that time?

A. Yes, sir. He also has a six month probationary period.

Q. These books of instructions to which you referred are furnished to all of the car service employees are they not?

A. Yes, sir.

Q. The porter has them as well as the conductor?

A. Yes, sir, the same book.

Q. Yes, sir. How long before leaving time are you required to report on duty at the train?

A. Oh, let's see, on this run that I am on now I report

at 5:15 and we leave at 5:50.

Q. How long before leaving time is a porter required to report?

A. I don't know about that; I think they report a little earlier than that; maybe 5 o'clock.

Q. They are always there when you get there?

A. Not all of the time.

Q. Well, they are supposed to be, aren't they?

A. They are supposed to be, yes, sir.

Q. If they are not there, they are reported, aren't they?

A. Yes, sir.

Q. Just what is it now that you do in respect to this air conditioning equipment on the train, that a man of ordinary intelligence and a little training can't also do?

A. Well, there isn't anything.

Q. These instances to which you have referred in which you have rendered special or unusual services to passengers, [fol. 411] like say, an old lady who needs assistance, such incidents have occurred on the train, of course, where the conductor is in charge of the Pullman cars—

A. Yes.

Q. And you are not in position to say what happens on these cars when similar incidents occur, where the porters are in charge?

A. No, I wouldn't know anything about that.

Q. What is the run that you are on now, Mr. Cunningham?

A. On the Katy Blue Bonnet from Fort Worth to Kansas City.

Q. How many cars how many Pullman cars are in the train, one or more?

A. We leave out with two cars.

Q. You leave Fort Worth with two cars?

A. With two cars, yes, sir. We interchange cars, though, en route; there is a St. Louis conductor that comes up from Dallas that connects with us at Denison.

Q. Now, you go on, then, to Kansas City?

A. Yes, sir,

Q. You tie on another main train at Denison?

A. Yes, sir, we consolidate the two trains at Denison and rum as one train from Denison to Muskogee. At Muskogee they divide the trains again, one portion going to St. Louis and the other to Kansas City.

Q. I see. Then how many conductors are on the train, from then on when the train is consolidated?

A. Two conductors between Denison and Muskogee.

Q. How many, then, between Muskogee and Kansas City?

A. Just one Pullman conductor.

[fol. 412] Q. Well, when you say two conductors, you mean two Pullman conductors, don't you?

A. Two Pullman conductors; one St. Louis conductor with the St. Louis equipment, and one Kansas City conductor with the Kansas City equipment; they are on the train that has been consolidated at Denison between Denison and

Muskogee.

Q. Yes.

A. Yes, sir; and then when they are split again, of course, the St. Louis conductor goes with his equipment to St. Louis, and I go with my equipment to Kansas City.

Q. When the train is split, do you know how many Pull-

man cars are on each branch of the train?

A. Two on each train.

Q. Two on each train?

A. Yes, sir.

Q. Have you ever had charge of more than two cars on a given train?

A. On that train?

Q. On any train.

A. Oh, yes, I have had as many as 7 and 8 cars.

Q. 7 and 8 Pullman cars?

A. Yes, sir.

Q. Now, you said something about conventions, these convention trains, and you mentioned one incident, I believe, that happened on a convention train, or was that a convention train where these—

A. Well, it wasn't what you might call a convention train; it was extra equipment put in to catch the overflow from the breaking up of a convention. It was on a regular train; it was not on a special train.

[fol. 413] Q. When was that incident?

A. Oh, that is quite a number of years ago.

Q. Can you give as an approximate idea?

A. Oh, it might be possibly 15 years ago.

Q. 15 years ago?

A. Yes, sir.

Q. You mentioned wrecks. Are wrecks on the railroad trains frequent now or infrequent?

A. They are less than they used to be, considerably less.

Q. You don't know what the statistics are on it, do you?

A. No, I don't.

Q. Well, since-

A. That is, I haven't had any notice of wrecks coming under my own supervision or in the immediate territory where I operate; that is what I speak of.

Q. Well, you do, in fact, know, that as a matter of fact, since you have been running on railroad trains the wrecks

have been practically eliminated?

A. Yes, sir, a great many of them. We do not have very many bad wrecks any more.

Q. Now, you said that you have drinking on almost every train and on almost every trip that you take?

A. Yes, sir.

Q. Do you mean by that to say that you have passengers who get drunk on every trip?

A. They don't get drunk; very seldom we ever have a

passenger that gets down.

Q. As a matter of fact, what you mean is that on a train such as the one you are now running on there is more social drinking?

A. Social drinking in the club car—what is called the [fol. 414] club car or lounge car.

Q. Yes.

A. And sometimes the drinking is in the body of the car—the body of the Pullman car. If a passenger wants a table put up in his section of the car and he is served with set-ups, Mineral Water or White Rock from the club car or dining car, that is his privilege.

Q. When is the last time you know of a passenger being hurt on one of your trains from a ladder being left out in

the-isle?

A. Well, we don't have that.

Q. You don't have that?

A. No, sir, if has occurred, but it hasn't occurred with me.

Q. Well, of course, you don't know what happens in that respect on these porter in charge runs?

A. No, I can't say about what happens on the porter in

charge runs.

Q. Your testimony here as to your experience and observation is based entirely upon what you have—on the experience that you have had when a conductor was present?

A. Yes, when I was on the train, sure.

Q. Now, you recognize the fact that a Pullman conductor should be better qualified after he has had years of experience than when he is right new, don't you?

A. Well, I would think certainly that he has improved

with age and experience.

Q. Yes, you recognize that that is an asset in your favor, in your particular case—you are better qualified now by reason of your experience?

A. Yes, sir, and I think the company advertises that fact [fol. 415] in a poster that they have of Conductor Chiles of New York City, showing him as a Pullman conductor of years experience and as being a qualified and efficient man.

Q. Do the rules of the Company require the Pullman conductor to report to the train conductor any serious or unusual incident on the train, such as where a passenger may become unruly?

A. If it is of such a nature that you can't-control it your-

self, yes, sir.

Q. You have no authority to eject the passenger?

A. No.

Q. The train conductor is the only man that has that authority?

A. Yes, sir.

Q. And in every instance where a situation arises that calls for discretion, if there is any doubt as to what is the

proper procedure, you are instructed to confer with the train conductor, are you not?

A. That is our instructions, yes, sir.

Q. And then you are supposed to follow his decision?

A. Well, where I report to him he does the acting then.

Q. Yes. Now, what are the average number of passengers on the train—on the car that you are running on now?

A. Well, on one car, the Kansas City to San Antonio car, I have come out of Kansas City recently with it sold out completely, uppers and lowers and drawing rooms—a twelve section observation car. It usually runs, though, all lowers and the drawing rooms and you might say three or four uppers; sometimes it is lighter than that, but not often; it always has all the lowers.

Q. All right. What is the average number of passengers [fol. 416] that you have in the two cars, Pullman passen-

gers?

A. In the two cars? Well, let's see, say, 15 or 18; I would say around about anywhere from 15 to 20 passengers in the two cars.

Q. In each one or in the two cars?

A. No, in the two cars.

Q. All right, 7 or 8 per car?

A. Well, yes.

Q. 7 to 10 per car?

A. Well, something like 6 passengers, somewhere around there.

Q. All right. Now long does it take you to lift the transportation in the two cars?

A. About 15 to 20 minutes.

Q. You and the conductor usually work together in that process?

A. We work together—

Q. Yes, sir.

A.—unless there is an occasion where sometimes I work by myself; if the conductor has heavy work in front, why, he will ask me to take up his tickets for him, and then I will take his as well as my own.

Q. How long does it take you, then, to make up your diagram?

A. Well, if I had to start with a blank diagram and make it up it would probably take me 45 minutes or more; but my diagram is already started and all I have to do when I leave town is to enter the tickets on the diagram—the cash

and tickets that I take up; in that instance it doesn't take

over-probably not more than 10 minutes.

Q. All right. Now, if a train was just—had half as many cars on it as this train you are now running on, one car instead of two, and the average number of passengers on that car was about half that many, how long would it take [fol. 417] you then to perform those two services, lift the transportation and complete your diagram?

A. Oh, just about one half of the time.

Q. Well, that would be a total of 10 or 15 minutes for both services?

A. Yes, sir.

Q. Then, on such a train as this Cotton Belt run, line 3370 from Dallas to Memphis, where you say you had an average of 3 passengers per day, after you had completed that process that you have just described, what would you be doing the rest of the time on the trip?

A. The same as I would be if I had the car full.

Q. The same as you would be if you had the car full?

A. Yes, sir.

- Q. How much of the time would you be sitting down in a seat?
- A. Oh, probably I would be sitting down more than I would on a heavy car, because on a heavy car you have more duties to perform and more to look out after.

Q. Yes.

A. Well, if a car didn't have but one passenger in it, if the car got hot, and that passenger made a complaint, it would be just as hard on you as if it would be full of passengers.

Q. Yes.

A. So then you have to take care of that situation just the same if the car is light as you would if it was full of

passengers.

Q. Yes. If you go through a train that has several Pullman cars on it and you change the regulator, so as to either [fol. 418] lower the temperature or raise it, the instructions are that you shall notify the porter that you have changed it?

A. Yes, sir.

Q. Mr. Cunningham, what office do you hold in the Sleeping Car Conductor's Association?

A. Vice President of the Grand Division.

Q. Vice president?

A. Yes, sir, Vice President.

Q. Vice President of what?

A. Of the Grand Division.

Q. What is the name of the organization?

A. Order of Sleeping Car Conductors.

Q. Order of Sleeping Car Conductors?

A. Yes, sir.

Q. And it is national in its scope?

A. National in its scope. It is international too, you might say.

Q. International too?

A. Yes, sir.

Q. This limitation that is upon the Pullman Company's right to pool these runs is the result of an agreement between the Pullman Company and the organization, is it not?

A. In respect to the one—to one night operations, yes, sir.

Q. Well, whatever the limitations are, there are certain

limitations upon the Pullman Company?

A. Yes, whatever the limitations are they are the result of an agreement between the Order of Sleeping Car Conductors and the Pullman Company.

Q. Yes.

Judge McMillan: Is this an independent union or is it [fol. 419] affiliated with something?

The Witness: With the American Federation of Labor. Judge McMillan: How long has it been in existence?

The Witness: Nearly 20 years.

Judge McMillan: Nearly 20 years?

The Witness: Yes, sir.

Judge Sibley: Anything else, Mr. Graves?

Mr. Graves: Yes, sir.

Q. This order that was promulgated by the Railroad Commission was originally issued at the request of the Order of Sleeping Car Conductors through their attorneys?

A. That is right.

Q. And at the time that order was issued there was no notice of hearing at all before the order was issued?

A. No, I think the Commission—

Mr. Lewis: If the Court please, we object to that. The records would be the best evidence.

Judge Sibley: I was wondering about that. The record didn't disclose to me whether there was a hearing or not before the first order.

Mr. Graves: Yes, sir, the answer admits there was one hearing, Your Honor.

Judge Allred: That is my understanding of the plead-

ings.

Mr. Graves: Yes, sir. Well, but the order speaks for itself to this extent, the order states—the original order states—that it was done on the Commission's own motion, [for 420] and we want to show that it was done at the request of this organization.

Judge Sibley: Well, how would that matter? The Com-

mission did it.

Judge McMillan: They are the powers that be. Are

we concerned with their motives?

Mr. Graves: Yes, sir; we have authorities that we think, would be applicable on that very point. We think, in other words, that a Court of Equity, when it comes to pass on the reasonableness of an order of this kind or any other kind of police regulation can look under the skin for it.

Judge McMillan: That is certainly contrary to all holdings of Three Judge Courts in the oil cases; it frequently develops that we are not concerned with their motives.

Mr. Graves: Yes, sir, if you have a question of regulation or something of that kind, where they have the undoubted power, that would be a different question, but if it is as to rates, take the opinion of Judge White, then Associate Justice, in the 219 United States in Southern Pacific against the I. C. C., the Court held that it was the duty of the Court to look underneath the surface of the order and determine what is behind it and whether or not it is an honest, good, fair rate order.

Judge Sibley: Well, I am against you on the merits of it, but if you want to put it into the record, we might be wrong in our ideas and you might be entitled to have it in. [fol. 421] Mr. Graves: I don't care to pursue it any fur-

ther, Your Honor.

Judge Sibley': All right, sir.

Q. You don't pretend, Mr. Cunningham, to say to the Court that conductors are all perfect, and the porters are, in the main, not perfect?

A. No, sir.

Q. These frailties are human frailties, are they not?

A. Yes, sir.

Q. And these matters that you have mentioned are matters of character, and the conductors, if they are not the right kind of men, are subject to those criticisms too.

A. Yes, sir, we have some conductors that are not 100%

perfect.

Q. In the main, though, they are good men, are they not?

A. I think so.

Q. Just as in the main the porters are good men.

A. Yes, sir, or anyone else.

Q. Well, now, they are better than the average because the company makes an effort to get good men in both capacities, doesn't it?

A. Yes, sir.

Q. In the beginning?

A. Yes, sir, they investigate very thoroughly to find out whether they have got good men before they employ them.

Q. And keep on supervising them to find out whether they have made any mistakes?

A. From time to time, yes, sir.

Q. You testified at the Railroad Commission hearing, didn't you, Mr. Cunningham.

A. I did, yes, sir.

[fol. 422] Q. That is all.

### Redirect examination.

# Questions by Mr. Morgan:

Q. Mr. Cunningham, how often do the train conductors

actually go back through the Pullman cars?

A. Sometimes once on the trip to Kansas City out of the Division, out of Kansas City, sometimes twice, it all depends on their duties in the front. If they have got quite a bit to do, and haven't got time they can't possibly come back through.

Q. Do the train conductors have keys to the Pullman

A. No, sir.

Q. Who does have car keys for the Pullman cars?

A. The Pullman porter and Pullman conductor.

Q. You, as a conductor, or the porter, or either of you, you could lock the door so that the train conductor couldn't ever get back there?

A. Yes, sir, he couldn't open the door from the outside without a key.

Q. What is the duty of the Pullman conductor when the train is switching; like when your train goes to Waco?

A. Where they are cutting a train in two, and switching out a car, it is the duty of the conductor to go through and instruct the porter and put the tail gates across, and not only put them across, but fasten them, because there have been times that passengers have been injured, and not only passengers, but employees, on account of them not being fastened.

[fol. 423] Q. Is that the responsibility of the Pullman conductor?

A. Yes, sir.

Q. How often do you see supervisors on these trains, Pullman cars?

A. On my train, I guess it would be once a month.

Q. How often does the brakeman come through the car?

A. On the train that I have out of Kansas City the brakeman rides at the back, and that is over a flat track there, and he rides there probably for that reason.

Q. Is that uniformly true? Do brakemen always ride

back there?

A. No, sir, in some instances the brakemen do not ride back there. They come through the cars occasionally, but they don't ride back there.

Q. What service, if any, does the train brakemen render

to the passengers in the Pullman car?

A. None whatever.

Q. What service, if any, does the porter in the chair car render to the Pullman passengers?

A. None whatever.

Q. Does he ever go back there?

A. No, he has no business there.

Q. When we speak of brakemen and flagmen, those terms are used, mean the same thing, do they not?

A. Not necessarily. They have trains where they have a brakeman exclusively, and also a flagman, but not on these trains.

Q. I am talking about those trains.

A. I don't know if there are any Texas trains that have [fol. 424] the two different.

Q. I didn't get it clear when you were talking about that gate. What kind of a gate is that?

A. A collapsible gate. It is called a tail gate, on the end of each passenger car and Pullman car.

Q. Is it a hazard to the passengers?

A. It is a hazard, if you don't fasten it, because they may become very loose, and if you lean against it, sometimes they will collapse and shut up.

Q. What have you found about the porters? Have they caught on to the operation of this air conditioning very

well?

A. Some of them haven't, no.

Q. Some of them haven't?

A. No. Seems to be all Dutch to some of them.

Q. All right, Mr. Cunningham, have you found that most porters like the temperature a little warmer than white people?

A. As a rule the porters like a little warmer temperature

than anyone else, yes, sir.

Q. Now, Mr. Cunningham, when these zone superintendents or zone supervisors or agents for the Pullman Company who do the inspection, you conductor kind of have a grapevine route, as well as the porters, of getting the message around that this fellow is in that territory, don't you?

A. Yes, sir, a method of signals.

Q. And when the supervisor is going to be around, all of the conductors know about it, and all of the porters know about it?

A. Yes, sir, sometimes as much as an hour or more in advance.

Mr. Graves: I don't think it is very important, but I think he is covering a great deal of territory, asking whether all [fol. 425] of them know about it.

Judge Sibley: Didn't one of your witnesses so testify.

Mr. Graves: Yes, sir, and we don't make any question about that. They probably endeavor to find out about it, but I don't see how a man can know that they always know about them.

Judge Sibley: Even in school it was a little different when the teacher was looking than when she wasn't. All right, any further questions?

#### By Mr. Morgan:

Q. What supervision, Mr. Cunningham, if any, do the porters have in the operation of that car other than what

they receive from the conductors, other than when these supervisors are coming along? Do I make myself clear?

A. I don't believe I got that.

Q. All right. What supervision does the Pullman car have while en route?

A. You mean the Pullman porters—

Q. What supervision, if there isn't a Pullman conductor there, what supervision is there on the car other than the supervisor who travels periodically?

A. None only what the Pullman conductor gives out.

Q. That is all.

Recross-examination.

#### Questions by Mr. Graves:

Q. Some questions have been asked you by counsel about what goes on on your trains. I will have to ask you again; [fol. 426] you are speaking entirely from your experience on the trains where Pullman conductors are present?

A. Speaking entirely from my experience as a conductor

on cars on which I operate.

- Q. So, you don't know how often the train conductor comes through the train on these porter in charge operations?
- A. No, sir, I can't answer something on a car I was never on.
- Q. And you don't know where the brakeman or flagman rides on those trains?
  - A. No, sir, I don't.
  - Q. That is all.

Judge Sibley: We will take a five minute recess:

(Witness excused.)

(Thereupon at 10:40 o'clock A. M. Court was recessed until 10:55 o'clock A. M.)

W. M. Hadley, a witness introduced by the Interveners, having been first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Morgan:

Q. What is your name, please? .

A. W. M. Hadley.

Q. Where do you live?

A. San Antonio, Texas.

Q. How long have you lived in San Antonio?

A. Since March 1920.

Q. What business are you engaged in?

[fol. 427] A. Pullman conductor.

Q. How long have you been thus engaged?.

A. It will be 15 years next June.

Q. Continuously?

A. Yes, sir.

Q. Over what railroads have you run, Mr. Hadley, during that time?

A. During that time, practically all of the railroads in the State of Texas.

· Q. You were shifted about?

A. I have been, while I was on the extra board for 9 years.

Q. You are a party to this suit, aren't you, Mr. Hadley, as one of the interveners?

. A. So I understand, yes, sir.

Q. Mr. Hadley, will you tell the Court briefly just what

you do in supervising the service of a Pullman car?

A. Well, I go according to the instructions from the Pullman Company, which is to—when I go down to the train at night, I report for duty, check up the cars, find out if the porters are on duty, and check my diagrams, as I go through the stations, and find out if the berths are made properly, single sections or rooms, and that the air conditioning is properly set. I do that frequently. If I happen to meet the platform man, and he tells me that he has just been through there, I don't check after him, but frequently he says he doesn't have time, and for me to go ahead.

Q. That is before you take off?

A. Yes, sir.

[fol. 428] Q. After the train starts, what do you do?

A. If I don't collect the tickets at the table inside the station, railroad and Pullman, what we don't get there, I take up on the train, and collect cash fares, because they have gotten down late. I transfer passengers from upper berths to lowers, and lower accom-odations, and things of that kind. Then, I go through the train and—that is, the cars in my charge, and check them to find out if they match up with the diagrams, and go back and work my diagrams up then.

Q. Is it a part of your duty under your instructions to

keep proper decorum in the cars?

A. Yes, sir, all employees on the Pullman cars are under my personal supervision, and I am held accountable for their actions.

- Q. I am not talking about the duty to the employees. Is it your duty to see that on the cars the passengers on the cars conduct themselves properly?
  - A. I so understand.
  - Q. Do you do that?

A. I try to.

- Q. With reference to the employees, is it your duty to see that the employees on the car properly carry out their instructions and their assignments?
  - A. Yes, sir.

Q. Do you do that?

A. Yes, sir, I endeavor to do that.

Q. What is your run at this time, Mr. Hadley?

[fol. 429] A. Well, I operate on two runs. I operate on what we call the Katy Limited, or 11 o'clock Katy from San Antonio to Austin, from Dallas to Denison, Texas, and return. My next trip is from San Antonio to Corpus Christi on the one-car line.

Q. Is your run what is commonly known in the language of the conductor as a "bool" run?

A. It is pooled in a way. It is two runs together. In order to make a relief run, two reliefs that would make a regular run, or regular work, we pool those, and that makes

a regular conductor operation

Q. While we are on that subject, will you tell the Court how there could be any additional pooling or changing of schedules of conductors in your particular runs to take care of one of the lines complained of in this bill, namely, the one from Denison up the Oklahoma line. Is it possible for pooling to be accomplished there?

A. I don't think it would be necessary to pool the line. The hours would be so short to run a man over to Durant on that. It is only about 25 minutes between the time where

we get off at Denison.

Q. Was the terminal point formerly at Durant?

A. One time we ran to Parsons, Kansas, and one time to Durant.

Q. How long does it take the train to run from Denison to Durant?

A. About 25 minutes.

Q. How much per hour are the overtime conductors paid?
A. It is based on overtime, up to 240 hours, just the regu-

lar rate of pay.

Q. What is the regular rate of pay?

A. 80¢ per hour.

[fol. 430] Q. In this particular case, would it be possible for that run to be extended to Durant without consuming more than 240 hours of the conductors' hours on the train?

A. Well, it would take a little more than that, I believe,

on the 31 day month, anyhow.

Q. You have attempted to calculate that, haven't you?

A. It wouldn't run over that on me, because my hours are shorter on the other end of the trip, but two conductors on the 31 day month, I am pretty sure it would run a little bit overtime, not much.

Q. What experience, if any, have you had with reference to children or old people being committed to your particular

care on their journeys?

A. I have had many cases of parents bringing their children down, placing them in my care for various trips. Also, with children bringing their elderly parents down, sick, afflicted people.

Q. Can you give us a specific instance of some children

that have been committed to your care, of tender age?

A. I know of a good many of them. I can remember one that I had out of Houston, Rosenberg, Texas, a few years ago, and some passengers came to the train, and when I opened up the trap the porter and myself, they were standing near, and they said, "Where is the Pullman conductor?" and I said, "I am." They said, "We have a little girl to place in your care." She was going to Los Angeles, California. She had only half fare ticket, so that she was less than 12 years old.

Q. She was traveling alone, Mr. Hadley?

A. Yes, sir, so they gave me a letter-

[fol. 431] Q. You mean, her family?

A. Yes, sir, her family gave me a letter, that said in that letter where she was going, and what they would like for her to eat in the diner, and asked if I would look after her, and I told them that I would, and would turn the letter over to the connecting conductor in route, and would tell him to turn it over to the next one.

Q. Is that an unusual, or an average, ordinary experience that Pullman conductors have?

A. We have ones similar to that frequently. Sometimes they don't give letters, but just ask us to take care of their

children going from point to point.

Q. Mr. Hadley, have you ever had any experience with passengers on the train, both men and women, attempting to become intimate with the others?

A. Yes, sir, I have had a number of cases of that kind.

Q. Does that happen frequently or infrequently?

A. Well, I wouldn't know just how to term the words frequently or infrequently there. It happens ever so often.

- Q. Well, can you be specific? Can you tell the Court of a definite experience on that, in recent times, that you have had?
  - A. Yes, sir, I can.

Q. All right, just relate it briefly.

A. Well, I had one case going out of San Antonio on the train, S. P. 313, at that time was operating a car to Corpus Christi, and another to McAllen and Brownsville. I was lifting my transportation. I found there was a lady on a ticket, and a gentleman on a pass. They were getting pretty familiar with one another. I had lifted their transportation [fol. 432] and saw they were not man and wife, so as I started out to the other car I told the porter to kind of watch that party for me. I was going ahead and would be busy for a few minutes, and if anything happened out of the ordinary, to get me immediately.

They were kind of making a scene before the other passengers, and so he came up to me in a few minutes and says, "Cap, that man has just gone to bed with that woman." So I immediately went back, and knowing the man's name, I shook the curtain, and didn't get any reply, I shook it again and told him they only had transportation for one party for that particular berth, and still I didn't get any reply, and so I called the man by name and told him to go to his place in another car. He had a place assigned to him, and he immediately got out and put on his coat and put his feet in his shoes and went back to the car where he belonged.

Q. The man did comply with your request?

A. Yes, it didn't cause enough trouble for me to think I would have to go get the train conductor.

Q. Have you had any experience with any man or woman

on the train reaching a stage of insanity, becoming mentally unbalanced?

A. Yes, sir, I had something similar to that a short time ago.

Q. What was that?

A. I was on this 11 o'clock Katy, which I run on, and there was a passenger that I found boarded the train at Muskogee, Oklahoma, and he had been drinking all the way down. After leaving Dallas at night I was back in the lounge [fol. 433] car making up my diagram and in making up my tickets, and this party came back and sat down in the car smoking, and talking, and I thought he was talking peculiar like, so all of a sudden he told me, he said, "Conductor, this isn't right." He said, "I am not going to have what is going on." He said, "There are some people in this car that have a dummy, and are trying to scare me with it, put it in my seat." I looked at him, and I said, "Certainly we are not going to have anything like that—""

Q. Let's not go into too much detail.

A.—at any rate, the man acted out of his head, and evidently was, and he raised so much Cain, and got up waving his arms, and said he would kill those people if they didn't quit trying to scare him with that dummy, and I suggested that I move him, and he wanted to stay and fight it out with the dummy, and finally I persuaded him to move to another car. By that time it was twelve-forty-five, and the train conductor came back to check with me, and I told him what had happened, and I asked him to move him to Section 15, where there was a section that wasn't full.

Q. And did the train conductor—what time did the train conductor get there?

A. About 12:45.

Q. Was that the first time you had seen him after leaving Dallas about 11?

A. Yes, sir.

Q. What did the train conductor do with him?

A. He went with him, and I got my diagrams and was going to put out my cards, and when I got to the next car, [fol. 434] instead of No. 15, the man was in the drawing room, and the conductor was standing by the door, and I told him, I said, "Section No. 15 is where this man was going." And he said, "He has gone in this drawing room and I can't get him out." And I went in the drawing room, and I said, "We are tired of this business. The train con-

ductor will stop this train and put you off if you don't stop this." And he followed me on off, and I put him in the section, and he acted as though he was going to bed, and in a few minutes the porter told me the man was going ahead. There were ghosts in the car, and he went to the day coach and stayed there the balance off the night.

Q. What did you find was wrong with the man?

A: I understood from the passengers the next morning who were talking about his actions, he had been in the hospital for delerium tremens, and had started drinking again.

Q. Mr. Hadley, what—have you had occasion in your operations to take over a car that formerly was in charge of the porter, and the term is commonly referred to as porter in charge cars?

A. I do that every trip on the Katy. Q. Where do you pick up that car?

A. I pick up two at Austin. The porters also have the Ft. Worth and Dallas car, and when I leave Denison I pick up the Kansas City car that the porters handled from Kansas City to Denison and Tulsa.

Q. What has been your experience in reference to clean-

liness of those cars?

A. Some are different from others. Some porters seem to try to do their work, but most of the time I find there are [fol. 435] cigarette stubs and ashes and matches in the bottom of the car, sometimes I find beer bottles rolling around in there, a danger and a hazard to passengers.

Q. What are the regulations of the cars with reference to allowing passengers to smoke in the regular chair of Pull-

man cars?

A. They are instructed to request them to refrain from smoking there.

Q. Is there a compartment provided—

A. Yes, sir, there is a smoking room for men, and in some of the cars there is a lounge car.

Q. What has been your experience with reference to passengers that you have taken over on these porter in charge cars as to smoking in the main body of the car?

A. I find on numerous occasions, and have reported some of them, at Denison when I pick up one from Tulsa and one from Kansas City, when they have a pretty good bunch of oil men in there, sometimes they have 10 or 12 people in a car, why, the cars have cigarette stubs and ashes on the floor, and beer bottles rolling around, and sometimes when you go in out of the fresh air the smoke is thick. They

smoke so much the air conditioning hasn't been able to pull it out.

Q. What effect does that have on the air conditioning system?

A. It doesn't have anything to do with the system, it

makes the air foul.

• Q. Do you know that smoke has been one of the most perplexing and difficult problems of the air conditioning system to handle?

A. No, sir.

Q. You are not familiar with that?

[fol. 436] A. No, sir.

Q. What has been the experience you have had with the passengers when you find their car in that condition, and the passengers thus engaged in smoking, have you had occasion to request them to refrain *them* from smoking in the car?

A. I always do that. •

Q. What has been the attitude of the passengers?

A. A number of them have called my attention to the fact that they have been smoking from Tulsa to Denison, or from Kansas City, and they don't know why they should stop now.

Q. And on that trip before you took over was the porter allowing them to smoke?

A. Yes, evidently, from the looks of the car, and the ashes.

Q. What experience have you had with reference to the porters giving you the diagrams when you took over those cars? What condition do you ordinarily find them in?

A. Well, I find that especially on the Tulsa-Denison car, where there are five different porters operate, that I catch, or the Tulsa-Galveston car, and I pick them up at Denison, I have to make changes. There are tickets entered in error, and sometimes the wrong rate. I have found it where they collected the wrong rate, or too much for the fare, and I have to correct those diagrams, and there is another diagram turned over to me that the porter closes at Tulsa when he takes that car in, and it is turned in to me to hand in to the office at San Antonio. Some of those, the cashiers have told me of those diagrams, and I have seen them sending a note—

Mr. Graves: We object to that, and ask that it be stricken. [fol. 437] Judge Sibley: All right, the hearsay is excluded.

Q. Now, Mr. Hadley, what has been your experience with reference to the porters leaving the ladders in the aisles, the

long ladders that go to the second berth, the upper berth, and the short ladders and stools, what do you find about that?

A. We find that frequently that the ladder is in the aisle, and we request them to keep the ladder out of the aisle; and also the linen locker door is open frequently, and is a hazard to passengers coming around the corner. We close it and tell the porter to keep it closed.

Q. Where is the linen locker door you talk about?

A. Directly behind the smoking room on a car as you turn around to come into the car

Q. Is that a relatively small space in there?

A. Yes, sir, a little locker, and the door opens outward.

Q. They often leave that door open?

A. Yes, sir, and the company keeps after us all the time about that.

Q. Details like that, is it your duty to see that those details are cared for from time to time?

A. We are instructed in every safety and service meeting to that effect, yes, sir.

Q. Well, in your operations as a conductor are you constantly on the watch for such items as that?

A. Positively. If I don't I would be reprimended.

Q. What about the sanitation, the sanitary condition of the cars? Is that part of your assignment and part of your responsibility?

A. Yes, sir.

Q. Are you constantly attending to that when you are on the car?

[fol. 438] A. Yes, sir.

Q. What about the ventilation on the car?

A. Yes, sir, the same way. I find frequently in the lounge car that the ventilator back in the smoking room is left closed, and if that is true that smoke is allowed to go all over the car. I frequently find that closed and I close it or tell the porter to.

Q. What do you mean, when you pick up a car?

A. Like at Denison when I pick up a car, San Antonio to Kansas City, it is a lounge car from San Antonio to Denison.

Q. All right. Now, Mr. Hadley, air conditioning is relatively new on the trains, it is the last three or four or five years at least, isn't it?

A. Yes, sir, some four or five years.

Q. Do you know whether they have both mechanical refrigeration as well as using ice for the cooling of the cars?

A. Yes, sir, we have mechanical, ice, and some steam cars.

Q. All right. Now, conductors are given special instructions on the temperatures and how to regulate the air conditioning, aren't they?

A. That is right.

Q. Now, what have you found as to the porters? Do the porters catch onto the operation of the air conditioning

pretty well or not?

A. Well, some of them do, but there are some that we have considerable trouble with, especially when a car gets too hot. We find more of them too hot than anything else. And I will ask the porter to make a correction to see if he knows about it, and numerous times they will go to the panel and try to make it from there. It isn't always that you can. Sometimes you will find a valve stuck, frequently you will [fol. 439] find a valve stuck.

Q. Where are the valves located on a car?

A. Usually in the end sections on most cars. You will go there and pull the seat out and there is a little trap there and you can work that valve with your hand. The porters have those instructions the same as we do, but they don't get it.

Q. Such difficulties as you are enumerating, they are usual

or unusual?

A. I have some of them practically on every trip.

Q. Then do you have some instructions, or I mean do you have some particular difficulty with the porter on those particular items?

A. Not with the same porters.

Q. I don't mean that, I mean with reference to the air conditioning?

A. Yes, sir.

Q. Do you have both winter air conditioning and summer air conditioning?

A. No, sir, we don't use the ice on the cars now, or don't have the cooling air conditioning. Of course, we have air conditioning the year around. There is a difference in the air conditioning and cooling. You don't want to conflict with that. There is air cooling and air conditioning. The cars that are air conditioned are air conditioned summer and winter.

Q. You still steam heat them in the winter time, don't you?

A. Yes, sir.

Q. And that likewise is a matter that comes under your supervision?

A. Yes, sir.

Q. Steam heating is an old process that has been in use [fol. 440] many years, isn't it?

A. As far as I know. I have known it always.

Q. Your run now is from San Antonio to Denison, Texas?

A. That is right.

Q. On that run you have occasion, of course, to pass through Austin?

A. Yes, sir.

Q. Have you ever had occasion to handle university students? I mean students attending the University of Texas?

A. Numbers of times.

Q. When these university students go off to Fort Worth or Dallas on a football game they are usually a pretty rowdy bunch, aren't they?

A. Yes, sir. They are out for a good time.

Q. What experience have you had, if any, with those students failing to obey the requests of the Pullman porters?

A. Well, on one particular trip through Austin, in picking up some cars here, I found that a porter came running back to me where I was working and said that the students were breaking in the door and said they were going to kill him if he didn't let them through to have some spaces, that there was no room in the coaches. And I rushed up there at the door and found that the glass had been broken and screen torn and a bunch of students milling around there demanding to get in.

Q. You mean the glass on the Pullman door?

A. Yes, sir.

Q. Now, was that door between the Pullman and chair cars, was that locked?

A. Yes, sir, I had it locked because the students were demanding to get in there before that time when I went back to do some work, because they said there wasn't any room [fol. 441] ahead. We didn't want them in the Pullman because they were not Pullman passengers.

Q. Did the porter attempt to handle the situation?

A. I guess he did. They were ringing the bell and he went up there and they demanded to get in and he wouldn't

let them in, as I told him not to, and they broke the glass and screen.

Q. What did you do?

A. I told them they couldn't come back and they said they would, and I just kind of put up a bluff, I guess. I said they would come back over my dead body. But I guess they didn't, because I am still here.

Q. Have you had occasion or experience with university students riding in the Pullman cars attempting to get bois-

terous when riding in the cars?

A. Yes, sir.

Q. That isn't true of all students, of course, but some of them do that, don't they, Mr. Hadley?

A. That is correct.

Q. They are not any different from some other folks, the grown folks?

A. The old folks, too, yes, sir.

Q. Have you ever had occasion to find some of those boys and girls attempting to conduct themselves improperly on the train?

A. Yes, sir.

Q. Well, just tell the Court one instance of that, please.

A. Well, I took a young student out of the berth with a girl student going through Austin one time, after we left Austin, and sent him up ahead to the chair car, took him up there and told him to remain up there. I happened to know the young lady, to know her name and her family, and [fol. 442] I told him that I would report both of them if he didn't, and he did, he stayed up there.

Q. Of course, he complied with your request?

A. Yes, sir. .

Q. What do you find with reference to the amount of

drinking that now goes on on the train, Mr. Hadley?

· A. Well, it is much more now than it used to be, because it is openly done. It is permitted. They get on sometimes with a bottle in their hand. I have found them coming right down the ramp of the depot swinging a bottle, a quart bottle. Some people don't seem to care who sees them or anything.

Q. Would you say to the court that the amount of drinking now is greater than it has been during the fifteen years you

have been on the Pullman cars?

A. Yes, sir, much more, by women, men and students.

Q. Do you find that same thing true with reference to lady passengers the same as you do to men?

A. Yes, sir.

Q. I mean the increase. I am not suggesting they all drink.

A. Yes, sir.

Q. Now, Mr. Hadley, have you ever had occasion for a woman passenger on your train to become intoxicated to the extent she was unable to take care of herself and it became necessary for you to take care of her?

A. Yes, sir.

Q. When was that?

A. Well, there was one that I testified to before the other hearing.

Q. You mean the other hearing, the hearing before the Railroad Commission?

A. Yes, sir.

[fol. 443] Q. Briefly what was that?

A. Well, that was a party who got on the train at Galveston, Texas, and she—I didn't notice her being drunk when she got on, but it was hot weather and evidently the liquor was too much for her, and when I went into the body of the car she was very much intoxicated and creating a disturbance and talking loud, and I tried to get her ticket from her and I had to have a scuffle in order to do so. She jerked me clear into the berth in doing that, and I finally secured the ticket, and they wired to Houston to take the woman off the car, that she wasn't in a condition to remain in there. However, in the meantime there was a young lady that suggested she help me handle her, and I was very glad she did. She and I took the woman to the dressing room.

Q. You mean a young lady, some-

A. A passenger on the train, yes, sir, and I apologized to some of the other passengers on the train, told them we couldn't help that, that it was a case of liquor, and we took the lady to the dressing room, and she was going to try to quiet her and later bring her to her berth. And I told her to ring me when she wanted me and I would assist her. And she rang the bell and the porter came to me, I was coming back from the other car, and he told me this lady was ringing, and I went back and found this lady in a terrible condition. She was on the floor and her dress was over her head and in a messy condition. I helped this lady, got her to the berth and got her in there, and this woman

sat on the side of her berth and finally got her to sleep. By the time we got to Houston she was asleep, and the [fol. 444] officers were down there, but since she was asleep they let her go on to San Antonio. She was a manicurist in one of the hotels there.

Q. You pick up this car that comes through Austin that goes to Fort Worth and Dallas? There are two cars set out here. You pick up those, don't you?

A. Yes, sir, about 1:20 in the morning, or 1:10.

Q. You were here yesterday and heard the Pullman porters, both of whom operate on those cars. You heard their testimony, didn't you?

A. Yes, sir.

Q. Have you ever had occasion to eject any visiting passengers who were boisterous and loud? I mean people who were visiting the passengers on the train who were boisterous and loud, when you came through here to pick up those cars?

A. Yes, sir, with those same porters that testified.

Q. What time does your train get in here, Mr. Hadley?

A. Around 1:05 or 1:10. We are due out at 1:20,

Q. That was 1:00 A. M.?

A. Yes, sir, in the morning.

Q. Passengers are permitted to get on the cars who are going to Fort\_Worth and Dallas, is that right?

A. Yes, sir.

Q. They can get on at 9:30 on up?

A. Yes, sir, and go to bed.

Q. And then when the train, when this train comes by it picks up those two sleepers that are set out here?

A. Yes, sir.

- Q. What do you find with reference to the condition of the students at times in those cars?
- A. At times I find that the students, especially when the students are traveling, and there are several students in [fol. 445] there talking to the students that are going away, and they are drinking and smoking in the body of the car.

Q. You mean at 1:00 o'clock in the morning?

A. That is right. Sometimes we can hardly get them off there when the train starts, we have a time getting them out of there and keeping them from getting hurt.

Q. Do you ever find that these boys fail to take up the proper transportation of these people riding on the cars?

A. Yes, sir.

Q. Can you cite an instance?

A. On my last trip through here.

Q. When was that?

A. On the morning of the 17th, I believe.

Q. Was that last Friday night?

A. Yes, sir, about that time.

Q. All right, go ahead.

A. When I took the transportation over from the porters I found that in checking it in one of the envelopes, there was three or four or five passes of Mr. Rice M. Tilley's, but neither one of them was a Katy pass, for Katy transportation. In other words, none of the transportation was good on this line or this railroad. And I usually try to check that before it is turned over to the train conductor, although I don't lift it myself. It has caused confusion before, and I try to check it myself. I called that to the attention of the porter and he said that was what he gave him, and I said, "Don't you try to see whether the transportation is good?" And he said he thought he knew. [fol. 446] And I said, "I guess you will have to wake up Mr. Tilley and get his transportation." And Mr. Tilley was in lower one and his wife in lower twelve. And he woke up Mr. Tilley and got his transportation back and got his Katy transportation, and he gave his other transportation back. Other times I find they haven't taken up tickets at all and sometimes they get the wrong portion of a Pullman ticket.

Q. All right, Mr. Hadley, have you ever found any tendency on the part—or can you cite us an illustration in Texas—I believe you were telling us about the one from Amarillo, about the two couples that were attempting to stage a party on your train?

A. Yes, sir.

Q. Tell us briefly about that.

A. Yes, sir. Coming out of Amarillo, I believe it was the Fort Worth & Denver, two men kissed their wives and children goodbye, got on the train. They had two lower berths. They immediately went to the day coach, got two women, brought them back, said they wanted to get a berth for these girls. So I told them I didn't have anything but an upper berth left. The man said, "I will take the upper and give the girls the lower." I said all right. So I sold him the upper berth. But later, as I figure it was possible, they tried to and did get to bed with the women in the

lower berths, not going in the uppers. So I went to the berths and got them out. One man kicked a little, but the other didn't so much. Finally I got this one up in his upper berth and told him it would be a good idea for him to get up there and stay there, and he did. But I sat up that night instead of retiring, going to bed, as I am due to go, and watched and saw that they did not get together.

[fol. 447] Q. All right.

A. Well, they did get back together, but I got them out.

Q. I just want to ask you one more experience. I don't want to burden the Court with this line of testimony, but—

A. I might say, Mr. Morgan, the Pullman Company OK'd

my time and paid me for guarding there.

Q. What experience, if any, have you had with elderly women or blind women on the train?

A. Well, I had one out of Dallas.

Q. How long ago is that?

A. I don't remember. It hasn't been so terribly long ago. I don't remember the date.

Q. Mr. Hadley, will you briefly relate that experience?

A. Those things just happen.

Q. Relate to the Court your experience with this elderly blind woman.

A. Well, she was brought to my train and they asked me to look after her. It was some of her people. I don't know whether it was her daughters or relatives or what. And they explained something about her physical disability. They didn't state she was entirely blind, they just said she couldn't see very well. But going through the car the bell rang, and I went to her-to this berth, and I recognized that it was her berth, and I asked her what I could do, and she said, "Is this the conductor?" She said, I believe, "I want the conductor," is what she said, "I want the conductor." So she told me she wanted to go to the rest room, wanted me to assist her to the rest room. I said, "I will be glad to," and I did. I pushed the door open and told her where she could find the toilet, but she couldn't see it to get into it, so I went into the room and opened [fol. 448] the toilet door and had to assist her and have her hand on the bell, I put her hand on the bell and told her where to ring, that I would wait outside for her and help her back to her berth, and she rang and I assisted. her back to her beach. Ste was a very old lady and couldn't see.

- Q. Mr. Hadley, how often do the train conductors go through your Pullman cars?
  - A. On which line?

Q. On any line.

A. Well, on this Katy going out of Denison I lift the transportation for myself and the train conductor and they come back and get it after it has been lifted and take it back up ahead and check it. On the S-P I do the same thing.

Q. By lifting transportation do you mean that you are the one who actually asks the passenger for his tickets?

A. Yes, sir.

Q. That is lifting transportation?

A. I take up the Pullman and railroad transportation on both lines that I operate on.

Q. And the conductor doesn't even collect the passenger fare?

A. No, sir, not on these lines.

Q. And he occasionally goes through the train?

A. Yes, sir.

Q. Is that correct?

A. Yes, siv.

Q. Now, the Pullman cars are invariably on the back end of the chair cars, aren't they?

A. How is that?

[fol. 449] Q. I say the Pullman, the sleeping cars are on the back part of the train?

A. Yes, sir. Sometimes we have—now and then we have a day coach in between sleeping cars in order to facilitate the shifting or switching of the cars at Waco or Austin or the like. Now and then that is done.

Q. Now, ordinarily the Pullman cars are the rear cars on each train, is that right?

A. Yes, sir.

Q. And those, of course, the Pullman conductor and the Pullman porters are the only ones that have keys to the cars?

A. As far as I know, yes, sir.

Q. That is true in your run, isn't it?

A. I think now and then some train conductor gets ahold of a key. I don't think the Pullman Company furnishes it.

Mr. Graves: What was that you said? I didn't get that.

A. I say I believe now and then some train conductor gets a key, but I don't think that the Pullman Company. furnishes it. It is my understanding they don't.

Q. How often on your run, Mr. Hadley, do you have occasion to see a supervisor or someone in authority of the Pullman Company that is your superior officer? How often do you see them on your runs?

A. Well, I might see two or three in one month and

then I might not see any for three months.

Q. What is the practice of the brakemen with reference to riding on the back end of the Pullman cars, on your runs?

A. Well, on one run the brakeman rides back there except at stops where he helps the train conductor load and [fol. 450] unload passengers, discharge passengers.

Cross-examination.

### Questions by Mr. Graves:

- Q. Which runs are those, Mr. Hadley?
- A. Sir?
- Q. Which run is that that the brakeman rides in your car on?
- A. That is on the lounge car between San Antonio and Denison and Denison and San Antonio.
  - Q. That car is on the rear end of the train?
  - A. Yes, sir.
- Q. What about this run between San Antonio and Corpus Christi?
- A. Well, there are some of them there that are hardly ever back there.
  - Q. How many cars are there on that train?
  - A. One car.
  - Q. One Pullman?
  - A. Yes, sir.
- Q. Mr. Hadley, these incidents that you have related are unusual incidents, or are they typical of the everyday experience of a Pullman conductor?

A. No, I am glad to say we don't have that experience every day, sir.

Q. So when counsel asked you a few minutes ago to just give the Court one instance and you described one—do you have a number of such incidents that you could describe?

A. Oh, yes, sir. If necessary I could go on here and relate you plenty of instances of similar character.

Q. All right, how many have you had of that kind, now, in the last year?

A. Oh, in just the last year?

A. Yes, sir.

[fol. 451] A. I don't know. It wouldn't be so many in the last year, no, sir. I am speaking of in the last fifteen years.

Q. How many have you had in the last five years?

A. Of course, it wouldn't be near as many as it would be in fifteen. We don't try to remember all those things. It is just a part of our duty to look after those things. We try to get them attended to and let them go by. You have to study to bring those things out. It takes thought and study to remember those things.

Q. Can you now remember any other similar incident like

that in the entire fifteen years?

Judge McMillan: What are you talking about? He has

told about several incidents.

Mr. Graves: I was talking about the one where counsel directed his attention to it and said "please relate one such incident," as though there had been many others. It was the one where he made a young student get out of the berth.

A. Yes, sir, I can.

Q. How many of those can you recall?

A. Right now I would have to think to recall offhand, but any number of them.

Q. Do you think if you would get off and cogitate about it that you could recall some others?

A. Yes, sir, I know I could.

Q. But you can't now?

A. Well, I don't know. I might in a few moments time.

Q. I am asking you to tell about one other.

A. You want me to tell about one other right now?

Q. Yes, sir.

A. Well, coming out of Dallas on this train, this same [fol. 452] 11:00 o'clock Katy, I had a young couple get together, and this man was on a pass, and the girl, the best I remember, she was on a pass too, and I could possibly find her name for you if you want it.

Q. Were they students?

A. Sir?

Q. Were they students?

A. The man was.

Q. The man was a student?

A. Yes, sir.

Q. When was that?

A. They got together on the train.

Q. When was that?

A. That has been less than a year ago.

Q. Can you think of any others?

A. Not offhand, no, sir.

Q. Do you report such incidents to the company?

A. Sometimes I do, yes, sir. Not all the time.

Q. The rules require you to report them, don't they?

A. They do if I have difficulty with them, yes, sir. If I don't have any difficulty I don't know that it is necessary. If the man immediately goes to his space and there is no argument or anything of the kind, that is just kind of a closed incident.

Q. Well, the language of the rule is that you are required to report any unusual incident that happens on the train, is that not correct?

A. Similar to that, yes, sir.

[fol. 453] Q. But some of these incidents you have not reported?

A. That is right, yes, sir. If we reported every incident that happened we would be writing all the time, we never would have any time for ourselves.

Q. Now, then, one of the incidents to which you referred was one where you happened to be in the car ahead and you say the porter came and got you?

A. Yes, sir.

Q. And you went back then into his car?

A. Yes, sir.

Q. And gave it the required attention?

A. That is right.

Q. Now, if an incident should have happened on a train where the porter was in charge and where there was one Pullman car and one passenger car ahead, where would the passenger conductor be, the train conductor?

A. He would be up in the day coach, I suppose, where he

usually rides.

Q. He would be in the day coach or Pullman car, one of those two cars, wouldn't he?

A. One of the three cars maybe.

Q. One of the three if there were three cars and one of the two if there were two cars?

A. Yes, sir, unless he was on the ground. If they were stopped he could be on the ground looking after orders, if

they were stopped.

Q. Which one of these porters was it that you referred to [fol. 454] here as having found, when you came in here the other night, that he had failed to perform his duty, when you arrived here at 1:20 A. M.?

A. I believe it was Brown back there.

Q. On the Fort Worth car?

A. That is right, yes, sir.

- Q. Now, what was that incident that he had failed to take care of?
  - A. He lifted the wrong transportation for passengers.

Q. That was Mr. Tilley?

A. Rice M. Tilley, that is right. O. Who awakened Mr. Tilley?

A. I permitted the porter to do it. He had lifted the transportation wrong.

Q. You say permitted. Didn't you instruct him to do it?

A. Yes, sir.

Q. Why didn't you let him sleep until the next morning

and get it then?

A. The train conductor would have come back and get it. It is our instructions to see—I have had train conductors to come back at times prior to that and have us wake the passenger up and get it when the fare was lifted wrong.

Q. On how many occasions have you found beer bottles in the car here when you picked up that connection here at

1:20 in the morning? . . .

A. Oh, I couldn't enumerate those occasions. It don't happen every trip, but it has happened.

Q. Well, it is an infrequent happening, isn't.it?

A. I would call it infrequent, yes, sir. It isn't an every-day occurrence. It didn't happen when I was stationed over [fol. 455] here looking after those cars in 1928.

Q. It never did happen?

A. No, sir. I didn't permit passengers to go in and disturb the other passengers.

Q. You have made mistakes yourself?

A. Yes, sir.

Q. On the train, haven't you?

A, Yes, sir, positively.

Q. You have let passengers go from Dallas, Waxahachie, and places like that, to San Antonio when they wanted to go to Houston, haven't you?

A. Yes, sir, I let a passenger here a short time ago, an attorney, do that. He got in the wrong bed and he admitted it was his fault. He signed a statement that it was his own fault

Q. Let's see about that. I want to know what you did

A. I had a statement. I think Mr. Vroman has it, if you will read it.

Q. He had railroad transportation for where?

A. He had railroad transportation anywhere he wanted to go in the State of Texas, I guess, on the MK-T. He had a pass.

Q. He had a pass?

A. Yes, sir.

Q. He told you where he was going?

A. That is right.

Q. And you sold him a berth?

A. Yes, sir.

Q. A Pullman berth in the last car on the train?

A. No, sir, I did not.

Q. The car that you were then in?

A. No, sir..

[fol. 456] Q. Which car was it in?

A. In the car ahead of the one I was in.

Q. And you told him then where his berth was?

A. I told him, I told him I had turned the light on in the berth and told him what berth he had and what car he had, and I had given him a receipt to that effect.

Q. Instead of his going to his destination, to what point

was he carried?

A. He got in bed in the wrong berth. He didn't go up to his car. He got in a berth in the same car he was then in and went to San Antonio.

Q. When you arrived at Waco the conductor that picked up the San Antonio car—the Houston car—called your attention to the fact that there was one passenger shy in that car, didn't he?

A. Yes, sir.

Q. You didn't then check the other car to see whether the passenger that was shy in the one car was in the other car?

A. No, sir. It was my understanding that the passenger was to set up to Waco. He had some schedules, and I had asked this porter Lane back here if the passenger had gone ahead and he told me he had.

Q. As a matter of fact, he had, hadn't he?

A. No. sir.

- Q. The passenger had gone ahead and later come back, hadn't he?
  - A. No, sir, he never did go ahead.

Q. He never did go ahead?

A. No, sir.

Q. Under the rules, Mr. Hadley, it was your duty to check your car, wasn't it?

A. I did check the car before the passenger went to bed.

[fol. 457] Q. Yes.

A. And put out my call card. The car was checked on arriving at Waxahachie where this passenger got on, and then I worked my passengers afterward.

Q. If this conductor found that he was shy one passenger and called your attention to it and you had checked your—

Judge Sibley: Is there any use trying that out? He says he has made mistakes.

Mr. Graves: If I may, Your Honor, I would like to ask this one question.

Judge Sibley: All right. &

- Q. If you had then checked the other car, the San Antonio car, you would have discovered that the passenger was in there?
  - A. Sir?
- Q. I say you would have discovered that the passenger was in there?
- A. If I had rechecked this other car I would have found the passenger in there, that is correct.

Judge Sibley: I don't want to be impatient, gentlemen, but these are questions that an intelligent person could answer easily, and it doesn't seem necessary to load the record up with them.

(Witness excused.)

W. L. Beamer, a witness for the defendants, was sworn and testified as follows:

Direct examination.

Questions by Mr. Rotsch:

Q. What is your name?

A. Beamer, W. L. Beamer.

[fol. 458] Q. How old are you, Mr. Beamer?

A. Sixty-one.

Q. Where is your home?

A. Denison.

Q. How long have you lived in Texas?

A. Forty-one years.

Q. And where were you born?

A. Georgia.

Q. Now, who are you employed by ?-

A. The MK-T Railroad.

Q. In what capacity are you employed now?

A. Conductor.

Q. How long have you been working for the MK-T Railroad, altogether?

A. It will be thirty-nine years the first day of April.

Q. When you first went to work for the MK-T what job did you have?

A. Well, I had a job as check clerk and shipping clerk in the store department, and later timekeeper for the mechanical department.

Q. How long have you been a conductor?

A. I was promoted in 1907.

Q. Now, you haven't been with the MK-T continuously,

since you went to work, have you?

A. Well, I have held my rights continually. However, I was off from March, 1923, until March, 1935, as salaried chairman for the Order of the Railway Conductors for the Katy Lines.

Q. What do you mean by salaried chairman for the Order

of Railway Conductors?

A. They have a chairman for the system on a salary who [fol. 459] handles schedule matters and agreements.

Q. You did that work then for approximately twelve years?

A. Yes, sir.

Q. Now, what is your run? That is, on what train or trains do you work on now?

A. I am in what we call a pool out of Denison, between

Denison and Dallas and Denison and Fort Worth.

Q. Where do those—you mean you run one time from Denison to Fort Worth and back and another time from Denison to Dallas and back?

A. The way we start out is Denison to Dallas. We go down of a morning and stay in Dallas all day and come back

that night on the Blue Bonnet. The next day we come to Fort Worth on the Blue Bonnet and go down of a morning and come back that evening, and the next day, the third day, we go down to Fort Worth on the Katy Flyer, or 25, and back, in continuous service, on train 24, and the fourth day we lay over. There are four of us in that pool.

Q. Now, are there any Pullman cars on any of those trains that are known as porter in charge cars that don't have

Pullman conductors?

A. Yes, sir, on the No. 11, of the Blue Bonnet South on the Fort Worth side.

Q. Do the other trains that you operate on have Pullman conductors, though, in charge of the Pullmans?

A. Yes, sir.

Q. Have you ever worked on any other runs as a train conductor in which there was a Pullman car without a Pullman conductor in charge of it, a porter in charge run? [fol. 460] A. I have worked some between Wichita Falls and Whitesboro where no Pullman conductor was on the car, just a Pullman porter.

Q. That was before your present runs?

- A. It was during the time that the man over there was off and I took his vacancy.
- Q. Now, are the Pullman cars fixed so they can be locked with a key?

A. Yes, sir.

Q. Who carries the key to those Pullman cars?

A. The Pullman porter and the Pullman conductor, I suppose.

Q. You don't have a key?

A. I did have one and they made me give it up.

Q. Do you recall any instance of the car being locked by the Pullman porter so that you couldn't go back through the Pullman car?

A. Yes, sir. Occasionally in Denison where they are shifting the train porters, probably some of them are off duty and those that are off duty will lock their cars so people can't get in and out, and I have found those doors, those cars locked.

Q. That confines you, then, up to the part where the chair are and coaches are and the baggage car?

A. Yes, sir, except you can punch a button and they will come and let you in.

- Q. But you have to depend on the Pullman porter coming and unlocking the door and letting you in?
  - A. Yes, sir.

Q. Now, have you observed these porters in charge to some extent on your run, going back there occasionally?

A. Not very closely. I generally go back and do my work. [fol. 461] Q. Then have you observed the cars and the conductors where they have a conductor in charge, a Pullman conductor, I mean, have you observed them and their work?

A. I have worked with them, yes, sir.

Q. Now, do you recall any instances, particularly on that run through Whitesboro up towards Wichita Falls, of lady passengers being on the car where there is just a porter in charge and something unusual occurring that attracted your attention?

A. I remember on one occasion we didn't have any passengers out of Wichita Falls, and when we got to Henrietta we picked up a woman. I went back before we got to Nocona and got her transportation. The porter waited for me, and he got his transportation at the same time. I went to the rear end of the car and when I came back she asked me if that was all the passengers that was on the car, and I told her that she was the only passenger.

Q. You were the train conductor?

A. Yes, sir.

Q. All right.

A. And she spoke about the business and one thing or another, and she said she believed she would rather ride over ahead if she was going to be back there by herself, and I told her there was probably room over there for her in the chair car. And I worked on ahead all the time, and leaving Nocona I noticed she was over in the chair car and stayed there until we got nearly to Whitesboro.

Q. Did she express herself as being afraid to be back

there in the Pullman with the porter?

A. Not in that way. She said it was rather lonesome [fol. 462] back there, looked rather lonesome. She made

no complaint about that.

Q. Now, during that interval when you were working as chairman for the Order of Railway Conductors, do you remember an instance similar to that of a lady being on a car where there was a porter in charge?

A. Yes, sir.

Q. Tell the Court about that incident.

A. Well, coming out of Oklahoma City when they had the car that set out—that is, it built up the train at Oklahoma City—the train conductor or train crew went on duty about 11:00 o'clock. The Pullman porter opened up the Pullman car at 9:00 or 9:30 and loaded passengers for Muskogee, or down the line. So I went down and got in that car going to Muskogee and when I went in there there was a lady sitting up in the front end of the car and I sat down in the rear end of the car. The porter was on the outside when I went in, and of course he came in and went to making down berths. He made down two or three and the lady got up and looked around a little and she came back and introduced herself to me and told me she was going to Muskogee and wanted to know where I was going and all about me, and then she apologized for trying to form my acquaintance or make the inquiry she had made. but she said she was planning to go home but didn't like to go to bed with a negro porter there, and she went out then and went over to the depot, and I went to bed, and the next morning I saw her get off at Muskogee, and I did too, but this other passenger was all.

Q. Now, Mr. Beamer, basing your answer that we are now asking for on your experience, is it your opinion that [fol. 463] it is necessary for the safety and welfare of the passengers on a sleeping car that there be a Pullman conductor in charge of the car in addition to a Pullman porter?

Mr. Graves: Now, just a minute. May it please the Court, we object to his expressing an opinion as to the ultimate fact to be decided by the Court.

Judge Sibley: That looks like it is objectionable. Do

you wish to argue it?

Mr. Rotsch: No, we don't wish to argue it. Judge Sibley: Exclude the evidence.

Q. Mr. Beamer, have you ever regulated a ventilating system in a Pullman car when you were on the train as train conductor?

A. No. sir.

Q. Do you know anything about the ventilating system of Pullman cars?

A. No, sir.

Q. Do you exercise authority over the ones in charge of the Pullman car, that is, the Pullman conductor or the porter in charge, whichever it happens to be? And by that I mean what do you actually do? Do you give them orders, tell them how to do, or do you just leave them to operate as they see fit? Tell us about that.

A. I have never instructed a Pullman employee to do anything. I would if they were to call on me to assist them

in ejecting a passenger or anything of that nature.

Q. Well, do you, as far as the actual operation is concerned, do you supervise the Pullman car or do you leave the supervision of the Pullman car entirely up to the Pullman employee?

A. Inside of the car I leave it up to the employees. [fol. 464] Q. And do you go on the basis that that is your job and you don't butt in on it, is that right?

A. Yes, sir, that is right. But I would like to qualify that

statement a little.

Q. All right.

A. If it is permissible. It has been stated here that a conductor is a captain of the boat from the Pilot to the rear end of the train, which is always considered true. But that applies, as I understand it and always have, to the operation of the train and the conduct of the employees on the train. Now, when it comes to the engineer, when it comes to the operation of the train, we try to cooperate with him, or in other words, at times instruct him what we want him to do. When it comes to the mechanism of the engine, telling him how to operate or run that engine, we don't do that, and if he has a man failure we don't report him and he doesn't report it to us. The same way with the mail and express men and the dining car system. We don't go in the dining car and give them any instructions at all. That is a separate department. And if one conducts himself unbecoming or anything of that kind I would try to handle it, and the same way is true with the Pullman people. haven't got any book of instructions or rules or we don't know anything about their rules or instructions, but we do know about what we would do or try to do in case of improper conduct or if they were to call on us to help them.

Q. Mr. Beamer, you have observed the porters and Pullman conductors and those porters designated as porters in charge. Do you have an opinion on whether you would have a preference as to who you would place members of your

[fol. 465] family in charge of, particularly the women members of your family, if you were sending them on a trip?

A. Well, I would say this, if I was to go down to a place to send any members of my family, which is four daughters and a wife, and there were two trains standing there ready to go the same place and one had a Pullman porter in charge and one had a Pullman porter and conductor, I would put them on the one with the Pullman conductor.

Q. The one with the conductor?

A. Yes, sir.

(Witness excused.)

(The Court then, at 12:05 p. m., Tuesday, February 20, 1940, recessed until 2:00 p. m., of the same day, at which time the following proceedings were had:)

[fol. 466] Tuesday, February 20, 1940

Afternoon Session, 2:00 o'clock

W. L. Beamer, a witness called by the defendants, resumed the witness stand, and testified as follows:

Cross-examination.

# Questions by Mr. Graves:

Q. You are an M. K. & T. Railroad conductor?

A. Yes, şir.

Q. A passenger conductor?

A. Yes, sir.

Q. Do you have a copy of the book of rules governing the operation of trains?

A. I have one at home, yes, sir.

Q. The company has furnished you with one?

A. Yes, sir.

Q. And they furnish the same rules to all conductor-, do they not?

A. Yes, sir.

Q. You endeavor to enforce those rules on your train?

A. Well, yes, sir; we try to carry them out.

Mr. Graves: That is all.

(Witness excused.)

C. E. Lowery, a witness called by defendants, having been duly sworn, testified as follows:

#### Direct examination.

# Questions by Mr. Rotsch:

Q. What is your name? [fol. 467] A. C. E. Lowery.

Q. How old are you?

A. Sixty-three.

Q. By whom are you employed?

A. M. K. & T. Railroad Company.

Q. How long have you been an employee of the M. K. & T. Railroad Company?

A. My service record shows from 1892.

Q. Continuously?

A. Yes, sir.

Q. Up to the present time?

A. Yes, sir.

Q. What position and line of work are you in now for the M. K. & T. Railroad?

A. Passenger conductor.

Q. How long have you been a passenger conductor?

A. Approximately twenty years.

Q. By "passenger conductor", you mean train conductor?

A. Yes, sir.

Q. Where do you live?

A. San Antonio.

Q. What run are you on at the present time as a passenger train conductor?

A. North-bound I leave San Antonio at 1:30 in the afternoon and arrive at Waco at 7:00 o'clock; and returning, I leave Waco at noon and arrive at San Antonio at 4:30.

Q. Your run consists of San Antonio to Waco, and return?

A. Yes, sir.

Q. On that run are there any Pullman cars on your train? [fol. 468] A. Yes, sir; north-bound there is one Pullman car; south-bound there are regularly three.

Q. Is there what is termed a porter in charge any time on that Train? That is is there a time when there is no Pullman conductor, but only a porter in charge of the car?

A. That would be the north-bound train from San Antonio to Waco.

Q. This north-bound train is a local train, is it?

A. Yes, sir..

Q. It stops at the smaller places?

A. Yes, sir.

Q. Tell the Court what your duties are and what you

actually do when the train stops at these stations.

- A. Well, if the brakeman is on the rear end, I work the trap for the white people to get on and off the train, and I watch the loading and unloading of the mail, baggage and express, and either authorize or give the proceed signal for the train.
- Q. You say you watch the place for the white people to get off and on the train?

A. Yes, sir.

Q. How many cars are there on that train that carry white

people?

- A. The chair car is exclusively white, and the day coach is a "Jim Crow" car—that is, it has two compartments, one for white and one for colored.
  - Q. One for white and one for Negoes?

[fol. 469] A. Yes, sir.

Q. And there is a Pullman in addition to that?

A. Yes, sir.

Q. Is the Pullman on the rear of the train?

- A. Well, not always. At the present time it rides on the rear.
- Q. When you are watching the people get on and off, do you stand up by the chair car and coach where they get off?

A. I am usually close to the mail car.

- Q. How far is that from the entrance where the people get on and off the Pullman car?
- A. Well, possibly the Pullman car would be the fourth car back.
- Q. Who watches and takes care of the people who get on and off the Pullman car on your train?

A. The porter, I notice, usually puts his box down and loads and unloads the passengers.

Q. When you make stops at small places like Georgetown,—that is one place you go through?

A. Yes, sir.

- Q. And other towns, and somebody gets on the Pullman car, do you know of your own knowledge when they get on that Pullman car?
  - A. Not always.

Q. You mean that you are so busy at the front end of

the train you can't watch all of it?

A. I would not pay so close attention to that as to the day coaches, because I expect the Pullman employees to take care of that.

Q. When that train starts, you don't know whether or not someone has gotten on the Pullman car, or not?

[fol. 470] A. No, sir; not positively.

Q. Now, what do you do, and what are your actual duties when the train starts and is in motion from one town to another town?

A. I pass through the coaches always to see if any passengers got on,—usually on information from the brakeman, if he works the trap. If he does not, I am in position to know who got on there

who got on there.

- Q. Do you supervise the chair cars and the coaches where passengers ride,—that is, the cars where passengers ride, other than the Pullman, personally, and go through them quite often?
  - A. Yes, sir.

Q. Tell the Court whether or not you personally supervise the Pullman car, or do you leave that up to the Pullman employees?

A. Well, I figure the passenger there is the Pullman Company's passenger, and it is their business to look out for them up to the point where something unusual might occur.

Q. Are the Pullman cars fixed so that the door can be locked?

A. I believe there is a night latch. You can open the door with the knob from the inside, but not from the outside.

Q. It takes a key to open it from the outside when it is locked?

A. Yes, sir.

Q. Do you carry a key?

A. No. sir.

Q. Have you known of instances when it was locked so that you could not have gotten in there if you had wanted to get in there quickly?

[fol. 471] A. A few times I have found them locked when I didn't expect it. I have authorized them to lock the door.

Q. Do you go back there if they come up—if some of the Pullman employees come up to the front of the train and ask you to go back there because of some unusual circum-

stance, do you make a special trip and go back to the Pullman car?

A. Yes, sir.

Q/Do you recall any instances, or did it ever happen that you went back there because of the misconduct of passengers, particularly between men and women?

A. Yes, sir; in several cases in the past ten or fifteen

vears.

1.

Q. Don't give all of them, but pick out one instance as to misconduct between men and women, and tell the Court.

A. Well, the most recent case, I think, was something like seven or eight months ago the Pullman conductor came over to me and told me that there was either a man or a lady in the wrong berth, and we went back together and pulled on the curtain of the berth and asked if there were two passengers in there, and the man said there was, and I said, "I want the other ticket," and he said, "I belong in the other berth across the aisle."

Q. Was that a man and wife?

A. They were riding on government orders under difof ferent names and had purchased separate berths.

Q. What did they do then?

A. He readily crossed over, and I heard no more about it. [fol. 472] Q. He got out of the berth he was in?

A. Yes.

Q. Now, your line that you run on from San Antonio to Waco goes through Austin, which is the capital, and where the University of Texas is located?

A. Yes, sir.

• Q. Do quite a few students ride on your train?

A. Well, at the opening and closing of school and during

the football season, quite a number.

Q. Before I go into this question of the students, let me ask you,—do people who are intoxicated by excessive use. of liquor sometimes get on your train?

A. Quite often.

Q. Does that give trouble to the people in charge of the train?

A. There is a good deal of difference in drunks. Some are good natured and jolly fellows, and others want to fight and bother other people.

Q. State whether or not people in general have the respect for Pullman porters that they do for the train con-

ductor and the Pullman conductor?

A. My opinion is I don't think so.

Mr. Graves: I think that is a matter not within his province, and we object to it on that ground.

Judge Sibley: If he knows about it, I guess he can tell

it. We all have our ideas about it.

Q. What was your answer?

A. In my opinion, they do not.

Q. You don't think they have the respect for the Pullman porter that they do for the Pullman and train conductors?

[fol. 473] A. No, sir.

Q. Do you recall any instance where persons showed their disrespect to Pullman porters to such an extent that the

Pullman porter had to leave the car?

A. Well, I don't know whether you would call it disrespect or not. I had one drunk run the porter through six sleepers and the chair car where I was, and asked for help.

Q. When was that?

A. About a year ago.

Q. Where was this Pullman porter stationed at the time?

A. I believe he was in the rear car.

Q. You were up in the front part of the train?

A. Yes, sir.

Q. What did you do when he ran up to you, and what was the situation?

A. I had advance notice before that there was some trouble, because the Pullman conductor had told me that he and the porter had to pull this man off the brakeman, but he said he thought the trouble was settled. I did not see the man, but an hour or so after I left Austin, the porter ran into the coach where I was, and said there was a man back there raising a row and said he was going to kill him, and immediately I bked up, and the man was right behind him.

Q. Did you preve t the man from killing the porter?

A. I told the poier to go back and lock his door, and I kept the man in the car where I was.

[fol. 474] Q. It was a white man?

A. Yes, sir.

Q. What time of the night was this?

A. It was 2:00 or possibly a little later.

Q. In the morning?

A. Yes, sir.

- Q. Was the train carrying a Pullman conductor at that time?
  - A. Yes, sir.
- Q. But was that conductor on duty, or was he taking this interval when they are off, duty, and he was asleep on the train?

A. He was off duty at that particular time.

Q. And the one on duty was just the Pullman porter on the Pullman car?

A. That is the way I understand it.

- Q. Now, do you have any trouble from the students? Something was said about students.
  - A. Well, they are rather boisterous, I would say, more in a mischievous way, and very destructive, that is, in crowds.
  - Q. In addition to the University of Texas students, there are the Baylor students out of Waco?

A. And the S. M. U. and T. C. U. students...

-Q. The S. M. U. students out of Dallas and the T. C. U. students out of Fort Worth?

A. Yes, sir.

Q. You haul quite a few of those on your run?

A. Yes, sir.

[fol. 475], Q. During the holiday seasons how many students are sometimes on your train?

A. It varies from 150 to 300.

- Q. You mean there are sometimes as many as 300 on the chair cars and coach cars?
- A. We have sometimes four or five or six coaches and chair cars. Sometimes we have as high as twelve or four-teen cars under those conditions.
- Q. When you get several coaches or chair cars like that and an extra number of students like that on account of the rush or holiday season, how much actual time and actual supervision do you devote to the Pullman cars between Waco and Austin or Austin and Waco?

A. Well, with crowds like that and that length of train, Lean't give it much attention.

Q. How many times do you get back there going from Austin to Waco?

A. I might not go back any more after I take up the Pullman transportation, under those conditions.

Q. You mean you only get back there one time during that trip?

A. That would be possible during a trip of that kind.

Q. How far is that trip?

A. 109 miles.

Q. How do these students get along with the Pullman porters?

A. As a matter of personal knowledge as to what might

· occur between the two of them, I don't know.

[fol. 476] Q. Now, is there any equipment or mechanism or machinery on the cars that some of these stude is sometimes meddle with when they have a mischievous mood on?

A. Well, they will take the fuses out of the lights and take the globes out of the lights; and the worst thing they can do is set the emergency brake by pulling the cord that runs the entire length of the train.

Q. Does it take much of your time and attention to see that that is not done?

A. There is not much we can do about it until it happens.

Q. Can that happen on the Pullman car as well as on the chair car?

'A. Yes, sir; there are emergency cords on all of them.

Q. That cord runs all the way the length of the train?

A. All the way the length of the chair cars and coaches. I am not sure about the Pullman, but there is a cord attachment in there which operates the emergency valves.

Q. Do you know of any instances, of your own knowledge, where some mischievous students interfered with

the machinery and created quite a bit of trouble?

A. That practically happens on every train where a large bunch of them ride.

Q. Give us a specific instance.

A. I was on the regular train out of here at 1:20, and they were running a special just ahead of we, and they had been pulling the air on the train and stopping it a number of times. Of course, we did not know how far they were ahead of us at that particular time, and in one place [fol. 477] they stopped the train, and we came near running into them.

Q. How close did you come to running into them?

A. We were not more than ten feet from the rear of the train when the engine stopped.

Q. Now, do you think that a Pullman conductor on sleeping cars where there is only one sleeping car on the train serves any purpose?

A. Well, he has his paper work and the supervision of anything that goes on back there, and the car and passen-

gers all come under his duties.

Q. Do you think a Pullman conductor under those circumstances is necessary?

A. I think it would be much better.

Q. From what standpoint?

A. I would feel like I had less responsibility back there,—that the situation would be better taken care of.

Q. And the safety of the passengers and the train better taken care of?

A. Yes, sir; that is my opinion.

Q. Let's get back to what you do in actually supervising a Pullman car. When you do get back finally to the Pullman car, if you see anyone smoking there, would you take it upon yourself to have them quit smoking?

A. No, sir.

- Q. You don't take that responsibility? [fol. 478] A. No, sir.
- Q. Has a Pullman porter ever called your attention to drinking and smoking and incidents like that in the Pullman car? I mean except where it got so bad they run the Pullman porter out of the car.

A. You mean particularly smoking?

Q. Yes.

A. I never had any employee of the Pullman company complain of passengers smoking to me and ask me to stop it.

Q. Has a Pullman porter ever called your attention where there is a Pullman porter in charge and no conductor, when they have any misconduct of passengers, except in an instance where he is actually run out of the car—has he ever called you back?

A. It has only been about a year where I have been working where there was not a conductor in charge, and that was a daylight run, and a daylight run there is lots less drinking

than on night runs.

Q. If there has been any misconduct in violation of the rule, where the Pullman porter is in charge and there is no conductor, he has not called it to your attention, but it has just continued without your being called back there?

A. If there has been any, I didn't know it.

Q. Do you take it upon yourself to go back and make a

sanitary inspection of the Pullman cars?

A. No; I figure that that is under the jurisdiction of the Pullman Company and that they will look after it; and they are under my direction the same as the baggage man or [fol. 479] the mail clerk or the engine crew, as particularly applied to their conduct, but not as to the technical work.

Q. Do you go back there and regulate the heat and ventila-

tion?

A. No, sir:

Q. You leave that up to the Pullman employees?

A. Yes, sir.

Q. How many employees are there on the train that you

operate on?

A. Well, north-bound, it would be one Pullman porter, myself, a brakeman, and train porter. That is the operating crew besides the engineer and fireman. Of course, there are the dining room employees, the baggage man, and the mail clerk.

Q. On the chair cars the ones that attend to the passengers are the train conductor, the brakeman, and the train

porter?

A. Yes, sir.

Q. The train porter, an M. K. & T. employee, as well as the Pullman porter?

A. Yes, sir.

Q. And there is one chair car and one coach that has compartments for colored and white people together?

A. Yes, sir.

Q. And then on the Pullman car where there is a porter in charge only, on your run there is just a porter in charge?

A. Yes, sir; that is right.

Q. How many passengers ride in the Pullman cars both

ways on your train?

[fol. 480] A. Well, it is hard to say what the average would be; but I take it out of Austin in the last few months it has been running from 10 to 28 in one car. I don't know what the general average would figure up.

Q. Now, one other point. Tell us the accommodations and the equipment in the chair car on the present M. K. & T.

train that you operate on.

A. Well, we have chair cars that are practically new, and I would say were the last word. There are inclined chairs with plush upholstery, and a ladies' smoking room in one

end and a men's smoking room in the other, and running water, and tables to put up between the seats on which they serve their meals.

Q. The meals are served in these chair cars?

A. Yes, sir; we furnish them pillows day and night on request free.

Q. Now, this is not the Pullman, but the M. K. & T. chair car?

A. Yes, sir.

Q. Is it air conditioned?

A. Yes, sir.

Q. How does that compare with the Pullman car?

A. For daylight travel I would prefer it to the Pullman car.

Q. Is the physical equipment as comfortable?

A. The arrangements of the seats are different, but I should think more comfortable.

Q. In the chair cars?

A. Yes, sir.

Q. Nicer seats and nicer equipment? [fol. 481] A. Yes, sir.

Q. What does the Pullman car have that the chair car does not have?

A. Well, they have magazines and writing paper, and some of the lounge cars that the Pullman passengers use are equipped with radios.

Q. That is all you can think of additional that they have

that the chair cars do not have?

A. I don't know of anything else.

Q. Then there is the train conductor, the brakeman, and the train porter in charge of the chair car?

A. Yes; we are all up there.

Q. Were you served with a subpoena to come up here and testify?

A. Yes, sir.

Mr. Rotsch: That is all.

Cross-examination.

#### Questions by Mr. Graves:

Q. You have a copy of the railroad rules, have you not? A. Yes, sir.

Q. You endeavor to see that the rules are complied with on your train?

A: Well, not absolutely.

Q. You don't try to see that they are complied with?

. A. Under certain conditions I would be rather lenient in

the application of certain rules.

Q: Do you or not endeavor to comply with the rules in the way that the company construes the rules and attempt to have them carried out?

[fol. 482] A. I would try to comply with them in the way

that they would approve of.

Q. Now, in answer to a question a moment ago, you said that in the chair car of the train, there was the conductor, the brakeman, and the porter in charge?

A. We are working on that end of the train. I am in

charge of the train.

Q. You are in charge of the whole train, are you not?

A. That is right.

Q. On this afternoon train that passes through here at 3:55 going north to Dallas and Fort Worth, that is the train that you are running on now?

A. Yes, sir.

Q. It leaves San Antonio when?

A. 1:30 in the afternoon.

Q. Who takes up the transportation of the passengers in the Pullman car in that train?

A. I take up the transportation—the railroad transportation. The porter takes up the Pullman transportation.

Q. You are together when that is done?

A. As a rule, we work together, yes, sir.

- Q. So that when the train stops and a passenger enters the Pullman car, do you go back there then and get his ticket?
  - A. If I knew he was on there, yes, sir.

Q. How do you happen to find out?

A. I would expect the porter or brakeman or somebody to tell me that he was back there. In the absence of that, I would expect the Pullman porter to bring the ticket or notify me.

[fol. 483] Q. The Pullman porter?

A. Yes, sir.

Q. If a passenger got on your train at San. Marcos, or Georgetown, or Austin, you would not know about it un-

less either the brakeman or the Pullman porter came up

and told you about it?

A. En route I would go back and check with him to see if our lists corresponded. That is our instructions. Either with whoever is in charge or the conductor. Our instructions are to check frequently to see that we are together on the number of passengers in the Pullman.

Mr. Graves: That is all.

Mr. Rotsch: That is all we have.

Mr. Morgan: We have a large number of witnesses who have not been here before. Shall we have them all sworn at the same time?

Judge Sibley: I wish you would; it will save time.

(Thereupon witnesses were sworn.)

Mrs. H. B. Shank, having been called as a witness by intervenors, having been duly sworn, testified as follows:

Direct examination.

## Questions by Mr. Morgan:

Q. What is your name?

A. Mrs. H. B. Shank.

[fol. 484] Q. Where do you live?

A. Fort Worth.

Q. What business is your husband engaged in?

A. In the general insurance business.

Q. Have you any children, Mrs. Shank?

A. I do.

Q. How old are they?

A. They are now eight and ten. Last year they were seven and nine.

Q. Both little girls?

A. Yes; they are.

Q. Do you have occasion to travel on the Pullman trains?

A. Yes, sir, I do.

Q. Do you do that extensively?

A. Yes, sir, I do.

Q. Have you had occasion recently to go to the western coast and to the eastern coast a great deal on Pullmans?

A. Yes, sir.

Q. When you travel on the Pullman car, do you realize that you are required to pay an additional charge to the railroad company of at least one cent per mile, and then in addition to that you pay for the privilege of riding in the Pullman car; you understand that?

A. Yes; I do.

Q. Over and above a charge that is made for the privilege of riding in the chair car?

A. Yes; I do.

Q. Now, when you have occasion to use a Pullman car, [fol. 485] you expect to find a Pullman conductor on the train?

A. Yes; indeed, I do.

Q. If you had occasion to use the Pullman where there was no Pullman conductor in charge of the train, but only a porter in charge of the Pullman, would you ride on the Pullman?

Mr. Graves: In orde to be consistent, we make the objection that that is not the criterion by which any issue in this case may be decided, and we object to it on that ground.

Judge Sibley: I really do not know what the Railroad Commission's function is about these Pullman matters. It has been indicated that some court has ruled that they do not have any. If that is the law, it puts this case in one shape; but if they have the right to regulate the service on a Pullman, I suppose what the public wants and demands might have some relevancy. I am unfortunately not familiar with your law.

Mr. Graves: Of course, that is a disputed issue.

Judge Sibley: Maybe we had better hear the evidence, and see what we will do with it afterwards.

Q. The question was, would you ride on the Pullman car if only a Pullman porter were in charge of the car?

A. I don't think so. I don't know that that has been the case, but if it has, I certainly would not have ridden on the Pullman car with only a porter in charge if I had [fol. 486] known it.

Q. If you should have occasion to send your children on the train, to whom would you commit those two little girls for safe transportation?

A. I would put them in charge of a conductor.

· Q. You mean a Pullman conductor?

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A. The Pullman conductor, yes, sir, on the Pullman car.

Q. Would you think the little girls are safer in charge of a Pullman conductor than they are in charge of a Pullman porter?

A. I would expect them to be..

Mr. Morgan: That is all.

Cross-examination.

#### Questions by Mr. Graves:

Q. You are a resident of Fort Worth, aren't you?

A. Yes, sir.

Q. You are a good friend of Mr. Morgan's?

A. Yes, sir; I am.

Q. The attorney in this case?

A. Yes, sir.

Q. You came to the Railroad Commission hearing at his request?

A. Yes, sir; T came to the Railroad Commission hearing at his request.

Q. And also to this trial?

A. Yes, sir. I am very pleased to come at his request.

Q. Are you a native of Texas?

A. I am.

Mr. Graves: That is all.

(Witness excused.)

[fol. 487] Mrs. R. P. Lightfoot, a witness called by intervenors, having been duly sworn, testified as follows:

Direct examination.

## Questions by Mr. Morgan:

Q. State your name.

A. Mrs. R. P. Lightfoot.

Q. Where do you live?

A. 2402 Rio Grande Street, Austin, Texas.

Q. You live here in Austin, Texas?

A. Yes, sir.

Q. Are you the daughter of Judge Smith of Fort Worth?

A. Yes, sir.

Q. I believe you were born in Waxahachie; is that correct?

A. Yes.

Q. Have you had occasion to ride on the trains—the Pull-

man cars in particular?

A. Yes; I went to school in the north, and lived in the north a good many years, and commuted back and forth a good deal.

Q. Did you in your experience in commuting on Pullman cars, did you have occasion when you and your children were particularly in need of the service of a conductor-

A. When I was a young woman, I had a baby very, very

ill on a train.

Q. Where were you going then?

A. To Chicago.

Q. From where?

A. From Fort Worth.

Q. You got on the train at Fort Worth? [fol. 488] A. Yes, sir.

Q. Your baby became ill?

A. Yes, sir.

Q. Whereabouts was that?

A. He became slightly ill about through Missouri or about the top of Oklahoma.

Q. How old was the baby?

A. He was still a baby, just toddling around.

Q. What did the Pullman conductor do to assist you?

A. The doctor said the child would never have lived if

it had not been for him. Q. What did he do?

A. He sent the porter for hot water and put hot applications on the child, and then when the child looked like he was dying, he gave it artificial respiration and telegraphed ahead for a doctor to be in the St. Louis yard to take charge of it.

Q. You say that he did administer artificial respiration?

A. Yes, sir.

Q. Did he stay in the compartment or berth with you?

A. Yes; he stayed right by my side until the doctor had relieved him of the child, and he also held the train until the medicine could get there.

Q. Was that at your request or your suggestion?

A. I was too frightened to know. The Pullman conductor did that for me.

Q. And you think the service he rendered to you probably saved the life of your baby?

[fol. 489] A. The doctor said so...

Q. Do you think a Pullman porter could have done the

same thing for you?

A. Well, I thought I was pretty well equipped to attend to my child, but I was not; so I would not think a porter would be. This man knew more than I did.

Q. You live out here by the University, do you not?

A. Yes.

Q. You have occasion to see University boys and girls a great deal?

A. I have been here five years.

Q. You have a boy in school here?

A. Yes.

Q. Do you think the boys and girls pay much attention to

a Pullman porter?

A. Well, that is hard to say. There are certain classes of children, as well as porters; but an obstreperous child does not pay any attention to anyone, unless they know it has authority; and I shouldn't think they would pay much attention to someone whom they had been taught form infancy that they did not have to pay attention to.

Q. If you had occasion to ride on a Pullman car, would you feel safer if you had a Pullman conductor in charge than

if you only had a Pullman porter in charge?

A. I would feel very much safer.

Mr. Morgan: That is all.

Mr. Graves: No questions.

(Witness excused.)

[fol. 490] Mr. Morgan: We would like to have Miss Betty Johnson, please.

Miss Betty Johnson, a withess for defendants, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Morgan:

Q. Miss Betty, where is your home?

A. Los Angeles, California.

Q. Are you a student now in the University of Texas?

A. Yes, I am.

Q. How many years have you been there?

A. This makes the fourth year.

Q. Well, you are a graduate, then; you are a senior this year.

A. Yes, I am.

Q. Miss Johnson, have you had occasion to ride on Pullman trains a great deal?

A. Yes, sir.

Q. How often do you go to and from California from Texas?

A. Usually about twice a year.

Q. When you do this traveling, do you go by Pullman car?

A. I have most of the time.

Q. Miss Betty, when you do travel on a Pullman car, do you realize that you are required to pay an addition to the train fare an additional one cent per mile and then an addifol. 491] tion to that for riding on the Pullman?

A. Yes, sir.

Mr. Graves: It is an immaterial matter, Your Honors, for this purpose, and I am sure counsel does not want to misrepresent the record at all, but as a matter of fact, the basic differential is one cent between three cents and two cents, but those are merely basic rates, and it doesn't mean that in every instance or in the majority of instances that the differential is one cent per mile.

Judge Sibley: It is probably really competitive at the

bottom.

Mr. Graves: Yes, sir, that is correct. Judge Sibley: All right, go ahead.

Q. Now, Miss Johnson, in *irding* these trains have you ever in your experience had occasion for some of the passengers on the train to make advances towards you?

A. Yes, sir, I have.

Q. To whom did you look to for your protection in such an event?

A. I went to the Pullman conductor.

Q. Have you in your experience in riding on Pullman trains, Miss Betty, witnessed drinking on the part of passengers on the cars?

A. Yes.

· Q. Has that been considerable amount or just a small amount?

A. A great deal.

Q. When you get on the Pullman car, Miss Betty, to whom do you look for your safety and protection?

[fol. 492] A. Well, directly, I look to the Pullman conductor.

Q. Well, do you look to the Pullman conductor or do you look to the Pullman porter?

A. No, I don't look to the Pullman porter; he merely helps

me.

Q. What do you expect the Pullman porter to do for you,

Miss Betty, when you get on the train?

A. Well, I expect him to make the bed, to help me with my bags, putting them in the train and out of the train and to help me—if I happen to be in an upper be th to help me get up to the upper berth.

Q. Well, for any other service on the train to whom do you

look, then?

A. To the Pullman donductor.

Q. Miss Betty, would you feel as safe on the train if there is only a Pullman porter in charge of the train, as you would if there was a Pullman conductor?

A. No, I don't think I would?

Mr. Morgan: That is all.

Mr. Graves: That is all.

Mr. Morgan: By the way, one question, Miss Betty.

Q. Do you say you did encounter this drinking and improper advances to you on more than one occasion or just one?

A. Just once.

Q. What did you do?

A. Well, I didn't know what to do at first; it was about three years ago when I was a freshman here, and the only thing I could think to do was to go to the Pullman conductor [fol. 493] and ask him to have the men stop drinking or else retire to another place to do so.

Mr. Morgan: All right. That is all.

(Witness excused.)

Mr. Morgan: Mrs. Vardell, please.

MRS. PAT VARDELL, a witness for defendants, having been duly sworn, testified as follows:

Direct examination.

### Questions by Mr. Morgan:

- Q. Your name is Mrs. Pat Vardell?
- A. Yes.
- Q. You live here in Austin?
- A. Yes, I do.
- Q How many children do you have, Mrs. Vardell?
- A. I have two:
- Q. Have you ever had occasion to send those children when they were at a tender age by train?
  - A. Idid; I sent them to Mississippi from Fort Worth.
- To whom did you commit those children for safe transportation?
  - A. To the Pullman conductor.
  - Q. How old is your little girl now, Mrs.\ Vardell?
  - A. She is 13 now.
- Q. If you had occasion to send her to any point across Texas on a Pullman car to whom would you commit her for safe transportation?
- [fol. 494] A. To the conductor.
- Q. Would you send her if there were only a Pullman porter in charge of the cars?
  - A. I don't think I would.
- Q. If you are traveling on a Pullman train yourself, Mrs. Vardell, to whom do you look for your safety and protection?
  - A. To the conductor.
- Q. Would you feel as safe if you knew that there was no conductor on the train, and only a porter on the train?
  - A. No, I wouldn't in any emergency.
- Q. Have you ever had the train conductor to render to you any service on the train, Mrs. Vardell, when you were in a Pullman car? By the train conductor, I mean the man up in front of the chair car—the conductor up there.
  - A. Not when I was riding in the Pullman.

Mr. Morgan: That is all.

Mf. Graves: No questions.

(Witness excused.)

Mr. Morgan: We will take John Roberts.

JOHN ROBERTS, a witness-for defendants, having been duly sworn, testified as follows:

Direct examination.

# Questions Mr. Morgan:

Q. Your name is John Roberts?

A. Yes, sir.

Q. Where do you live, John?

A. San Antonio.

[fol. 495] Q. Are you a student now in the University?

A. Yes, sir.

Q. Have you had occasion to ride on Pullman cars, John?

A. Yes, sir.

Q. What year is this for you in school?

A. This is my fifth year.

Q. What do you study?

A. Law.

Q. John, you have been out at the University for five years and you know the students pretty well, don't you?

A. Yes, sir.

Q. From your experience with those students—have you ever had occasion to go on special trains with students, football specials and things of that kind?

A. Yes, sir.

Q. John, do you think that the students would listen to any correction from—on the part of a Pullman porter?

A. Well, do you mean would they obey him?

Q. Yes, sir.

A. I believe they would.

Q. You think they would?

A. Yes, sir.

Q. Do you think they would be more likely to obey a Pullman conductor than they would a Pullman porter?

A. Yes, sir.

Q. John, do you think that—you know that there is a great deal of drinking going on on trains, don't you?

A. Yes, sir.

Q. Do you think the women folks would be safer on the train if there was a Pullman conductor in charge than they [fol. 496] would be if there was only a Pullman porter?

A. I believe so.

Mr. Morgan: That is all.

#### Cross-examination,

Questions by Mr. Graves:

Q. Now old are you?

A. Twenty-two.

Q. Were you born in San Antonio?

A. No, sir.

Q. Where were you born?

A. Born in Crowell, Texas.

Q. Crowell?

A. Crowell, Texas.

Q. Crowell, Texas?

A. Yes, sir.

Q. How many students are there in the University of Texas now?

A. Oh, over 19,000, about 11,000.

Mr. Graves: That is all, Mr. Morgan.

(Witness excused.)

Mr. Morgan: We will take Miss Dorothy Dorman.

MISS DOROTHY DORMAN, a witness for defendants, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Morgan:

Q. Miss Dorman, where do you live?

A. Dallas.

Q. Are you a native of Dallas?

[fol. 497] A. Yes, sir.

Q. You, too, are a student in the University?

A. Yes, sir.

Q. Have you had occasion to ride on Pullmans, Miss Dorman?

A. Yes, sir.

Q. When you were riding on the Pullman trains, do you think that you are safer if there is a conductor in charge than you are if there is only a negro porter in charge?

A. I think so,

Mr. Morgan: That is all.

(Witness excused.)

Mr. Morgan: Next, I would like to have Miss Matala.

MISS MARIA MATALA, a witness for defendants, having been duly sworn, testified as follows:

Direct examination.

#### Questions by Mr. Morgan:

Q. Miss Matala, where do you live?

A. In Dallas.

Q. How long have you been living in Dallas?

A. One year.

Judge McMillan: What is the name, counsel?

Mr. Morgan: Maria Matala, M-a-t-a-l-a.

The Witness: That is right.

Judge McMillan: What is your first name?

The Witness: Maria, M-a-r-i-a.

Judge McMillan: Matala?

The Witness: That is right.

[fol. 498] Judge McMillan: I just keep the names of witnesses.

Mr. Morgan: Yes.

- Q. Miss Matala, where did you come from before you moved to Dallas?
  - A. Minnesota.
  - Q. You are a native of Minnesota?
  - A. Yes, I am.
  - Q. Have you had occasion to ride on Pullman trains?

A. Yes, sir.

- Q. Miss Matala, when you are riding on the Pullman trains do you think you are safer if there is a Pullman conductor in charge of that train than you would be if only an egro-porter was in charge?
  - A. Yes.
  - Q. You were born, you say, and grew up in Minnesota?

A. Yes.

Mr. Morgan: I think that is all.

(Witness excused.)

Mr. Morgan: I will next like to have Miss Muse.

MISS MARGIE MUSE, a witness for defendants, having been duly sworn, testified as follows:

Direct examination.

#### Questions by Mr. Morgan:

Q. You are Miss Margie Muse?

A. Yes, sir.

Q. You live here in Austin, do you, Miss Muse, now? [fol. 499] A. Yes.

Q. Where are you employed?

A: At the Scottish Rite Dormitory.

Q. In what capacity?

A. I am on the staff.

Q. In what capacity did you say?

A. I am on the staff.

Q. On the staff. Now, just what are your duties—do you supervise or help to take care of the girls?

A. My title is Associate Social Director.

Q. Now, Miss Muse, the Scottish Rite Dormitory is onthe Campus of the University maintained for a house of young women who are in attendance at the University?

A. Yes, sir.

Q. And it is your duty to help to take care of those girls?

A. Yes.

Q. Do you, Miss Muse, have occasion on your behalf to occasionally ride on the Pullman cars?

A. Occasionally.

Q. By the way, Miss Muse, are you the daughter of the old Judge Muse who used to be at Sherman?

A. I am.

Q. All right; you are a Texas girl, then, aren't you?

A. Texas born, yes.

Q. Miss Muse, if you were riding in a Pullman car would you feel that you were safer if you had a conductor in [fol. 500] charge than you would feel if you had only a porter in charge?

A. I would.

Q. What about the young women who are under your supervision out there, when you have occasion to send them from the University home.

A. Well, I have nothing to do with the way they go home. They have permission from their parents, they have signed

permissions.

Q. I understand, but I am asking you this question, do you think the girls—it would be safer for their protection for them to be under the care of a conductor than it would be for them to be only under the care of a Negro porter?

A. Yes, sir, I think so with the conductor.

Q. Miss Muse, in your travels do you remember seeing a train conductor back in the Pullman cars?

A. I don't recall.

Q. You seldom, if ever, see the conductor, do you?

A. Yes, I do.

Mr. Morgan: I believe that is all,

Mr. Graves: No questions.

(Witness excused.)

Mr. Morgan: We will have Miss Ann Hill, please.

[fol. 501] Annie C. Hill, a witness for defendants, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Morgan:

Q. You have lived here in Austin for a long time, haven't you, Miss Ann?

A. Yes, sir.

Q. You have been associated with the University for a number of years, haven't you?

A. I have.

Q. You have girls that now live in your home with you, Miss Ann?

A. I do.

Q. Do you have occasion to be intimate and closely associated with the girls—

A. Yes, sir.

Q. —as well as the young men over in the Library?

A. Yes, sir.

- Q. Miss Ann, you use the Pullman cars, do you, when you travel?
  - A. Yes.
- Q. For your own protection and safety do you feel that you would rather be traveling if you had a Pullman conductor in charge than if you had only a porter in charge?
  - A. I certainly would.
- Q. Do you think, Miss Ann, that the young men—the young girls that are with you as well as the other girls in the [fol. 502] University—do you think they would be safer if they were under the care of a conductor than they would be if they were under the care only of a porter?
  - A. That is the way I feel about it.
- Q. You, of course, are familiar, Miss Ann, with the amount of drinking that goes on on the Pullman cars?
  - A. Largely from hearsay; not from-
  - Q. Yes, I understand. I believe that is all.

#### Cross-examination.

## Questions by Mr. Graves:

- Q. Miss Annie, you travel frequently on Pullman cars?
- A. Well, my vacations are largely trips somewhere.
- Q. On the Pullmans?
- A. Practically almost always on the Pullmans
- Q. Yes, ma'am. Now, you draw a distinction, do you not, between a colored man who has put in long years of service and experience in the employ of a company like the Pullman Company, acted as a porter and has proved to be trustworthy and faithful and a man of good character, and another man that you don't know anything about?
  - A. Well, I think there would be, of course, a differ-
  - Q. You would attach—pardon me-
- A. But I think that I would always feel safer if I knew there was a Pullman conductor—a white Pullman conductor on my coach. I have that feeling.
- Q. Do you mean to say that you don't think there are any [fol. 503] colored people that are faithful and trustworthy and reliable?
- A. Not at all, no; I don't have that feeling; I think there are.
- Q. As a matter of fact, you know some of them are, don't you, Miss Annie?

A. Why, certainly; certainly I do.

Mr. Graves: That is all.

(Witness excused.)

Mr. Morgan: We will have Elliot Roberts next.

ELLIOT ROBERTS, a witness for defendants, having been duly sworn, testified as follows:

#### Direct examination

# Questions by Mr. Morgan:

Q. Your name is Elliot Roberts?

A. Yes, sir.

Q. Where do you live, Elliot?

A. San Benito, Sir.

Judge McMillan: What is the name, please?

The Witness: Elliot Roberts.
Mr. Morgan: Elliot Roberts.

Judge McMillan: Where does he live?

Mr. Morgan: San Benito.

Q. You, too, are a student, are you, Elliot?

A. Yes, sir.

- Q. You, of course, make these trips that University boys make when they go off on these excursions to Fort Worth [fol. 504] and Dallas?
  - A. Sometimes.
- Q. You have had occasion to ride on the train, of course?

A. Yes, sir.

Q. Elliot, do you think the boys and girls would pay much attention to a Pullman porter?

A. On excursions, no, sir.

Q. Do you think they would be more likely to pay attention to the Pullman conductor?

A. I do think so.

Q. Elliot, if you had occasion to send some member of your family—your mother—do you have a sister?

A. No, sir.

Q. If your mother were going away do you feel that she would be safer if she were in charge of a Pullman conductor than she would be if only in charge of a Pullman porter?

A. Well, just from what you have said, yes, sir.

Mr. Morgan: I believe that is all.

Mr. Graves: That is all.

(Witness excused.)

Mr. Morgan: If Your Honor please, we could go on with this indefinitely. I want to use just one more boy and then we will discontinue, because the others that are here, I think, if placed on the stand would testify to the same things.

Judge Sibley: All right.

Mr. Graves: We are not in any querulous mood with counsel, my friend, here, but we do object to his statement that he could go on with this indefinitely because we don't [fol. 505] think that he could. (Laughter)

Mr. Morgan: I believe the record shows there are over

10,000 students at the University. (Laughter)

Lambert Root, a witness for defendants, having been duly , sworn, testified as follows:

Direct examination.

# Questions by Mr. Morgan:

- Q. Your name is Mr. Root?
- A. Yes, sir.
- Q. What is your first name?
- A. Lambert.
- Q. Where do you live, Lambert?
- A. Mineral Wells.
- Q. That is right over west of Fort Worth, isn't it?
- A. Yes, sir.
- Q. Lambert, you, too, are a student out in the University, are you not?
  - A. Yes, sir.
  - Q. What year is this for you out there?
  - A. This is my first year. Q. You are a freshman?
- A. Well, I started in Law School; I went to Oklahoma four years.
  - Q. Oh, you got off to Oklahoma and went to school?
  - A. Yes, sir.

[fol. 506] Q. And you are in Law School this year?

A. Yes, sir.

Q. Have you any sisters?

A. Yes, sir, I have.

Q. How old are they?

A. One sister is 30.

Q. She is older than you?

A. Yes, sir.

Q. Lambert, would you think that your mother or your sister would be as safe on a Pullman train—with a porter in charge as they would be if they were in charge of a Pullman conductor?

A. Well, they might be as safe, but I believe I would rely

more on a conductor than I would a porter.

Q. You think you would feel better about it if you knew they were in charge of a conductor than you would if you knew they were in charge of a porter?

A. Yes, sir.

Mr. Morgan: I think that is all.

Mr. Graves: That is all.

Mr. Morgan: This gentleman right here, I would like to have him; this gentleman sitting here on the end, please.

[fol. 507] Bob Coquat, a witness for defendants, having been duly sworn, testified as follows:

# Direct examination.

# Questions by Mr. Morgan:

Q. You are Mr. Bob Cokert?

A. Bob Coquat, C-o-q-u-a-t.

Q. C-o q-u-a-t, is that the way you spell it?

A. That is right.

Q. Where do you live, Bob?

A. At Three Rivers.

Q. Three Rivers, Texas?

A. That is right.

Q. Are you a student at the University?

A. Yes, I am.

Q. Bob, have you had occasion to use the Pullman cars—the Pullman trains a great deal? ~

A. Yes, I have.

Q. Did you have occasion this last summer to make a rather extended trip?

A. Yes, I did.

Q. Where did you go?

A. We went to Europe, but, of course, first we went to New York—from San Antonio to New York.

O. By train?

A. Yes, sir, by train.

Q. By "we", whom do you mean? A. My mother and my sister and I.

[fol. 508] Q. Your mother and your sister and you?

A. Yes, sir.

Q. So you made the round trip from here to New York and back on your European trip by train?

A. Yes, sir.

Q. And you rode on the Pullman?

A. Yes, sir.

Q. Now, Bob, do you think that your mother or your sister would be safer on a train if they were under the supervision of a Pullman conductor than they would be if they were only under the supervision of a Pullman porter?

A. Yes, sir, I do.

Mr, Morgan: You may have the witness.

Cross-examination.

# Questions by Mr. Graves:

Q. Where did you say you lived?

A. Sir?

Q. Where do you live? .

A. At Three Rivers, Texas.

Q. Yes.

Mr. Graves: That is all.

Mr. Morgan: I believe that is all, if Your Honors please, with these boys. If Your Honors please, may these witnesses be excused; they want to go back.

Judge Sibley: Yes, sir, if you are through with them,

they may go.

[fol. 509] Mr. Morgan: Is that all right with you?

Mr. Graves: Yes, sir.

Mr. Morgan: If Your Honors please, we are just about through with our testimony. We are in this position;

we had on the suggestion of counsel as to the length of time we thought it would take, we both were under the impression that it would probably take longer than it has; they advised us yesterday afternoon that they thought that it would probably consume half of the morning, and all along we thought that would take up most of today. We are not asking that the matter be delayed at all, but we may be in position now, if the Court will give us just about five minutes, to say to the Court that we are through with our testimony; but I would like for the Court to give us just a few minutes to confer with associate counsel.

Judge Sibley: Well, we usually take about a five minute recess in the middle of the afternoon, so we will take it now.

Mr. Morgan: All right; thank you.

(Thereupon at 3:15 o'clock p. m. a recess was taken until 3:30 o'clock p. m.)

Mr. Morgan: May it please the Court, counsel has agreed to stipulate as to one item.

Judge Sibley: Yes, sir.

[fol. 510]

STIPULATION

Mr. Morgan: And that is pursuant to the provisions of the Order that they are complaining of. I should like to read into the record the provisions about which I should like to stipulate, and then I will attempt to stipulate it, if I may.

"It is further ordered by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provisions of the orders above set out, the Commission shall be notified, and its consent secured before such change or divergency from the terms of said orders is put in force."

In connection with that, we would like to stipulate, if the Court please, that none of the plaintiffs in this suit have notified the Commission of its desire to be relieved from the provisions of the order, nor has such consent been secured, nor has there been issued by the Commission any order itself, nor no application made for such exception. Judge Sibley: Do you close?

Mr. Morgan: Yes, sir, with that.

Judge McMillan: Are you going to stipulate that?

Mr. Graves: Yes, I think I understood, and that is, that [fol. 511] we made no application for an exception to the order.

Mr. Morgan & Yes.

Mr: Graves: That is all right.

Mr. Morgan: With that, we close, if Your Honors please.

## COLLOQUY

Mr. Graves: We have nothing, except these statements that we referred to this morning, and we desire to put them in evidence. Counsel are looking over them now. There is one other matter. We filed a petition of intervention for the three intervener plaintiffs, and it adopts the allegations of the complaint, the amended complaint, and it has only one fact, I believe, that isn't in the complaint, conditionally; and that is, that these three interveners had no notice of the hearing that was held by the Railroad Commission, and took no part in it, and knew nothing about it.

Counsel haven't denied that, they haven't filed any answer to it. They haven't really had much time in which to prepare an answer, but I assume they will not contro-

vert those facts.

Mr. Lewis: We will agree that the intervening porters did not receive any notice of the prospective hearing before the Commission.

Mr. Graves: And didn't participate in it.

Mr. Lewis: We will agree they didn't participate in it as parties. I don't know whether any of them were witnesses or not.

Mr. Graves: None of them were there, were they, Mr. Morgan, you were there?

[fol. 512] Mr. Morgan: They were not there, but we are not prepared to agree they were not notified.

Judge Sibley: They are sitting out there. We can find

out if you can't agree about it.

Mr. Graves: We have alleged it and they haven't denied it.

Judge McMillan: The Assistant Attorney General has stipulated that they were not notified. Can the intervener control his case?

Mr. Morgan: No, sir.

Judge Sibley: That acknowledgment of fact is made.

Anything further now?

Mr. Graves: May it please the Court, there is one other point. I believe it was yesterday; it may have been this morning, when we offered the Railroad Commission records in evidence, and Your Honors indicated that he thought it was perhaps not admissible. We really didn't understand whether there was a definite ruling on that point, and we offer it in evidence.

Judge Sibley: What do you offer it to show? Of course,

it isn't original evidence, what everybody said.

Mr. Graves: That is right, and we don't care to offer it for that purpose, and wouldn't want it considered for the purpose of showing what the facts are, but merely for the purpose of aiding the Court in interpreting the Order. I think that is the only purpose that it should serve.

[fol. 513] Judge Sibley: I don't see how it could serve that function. It is a right lengthly Order, written in

English.

Mr. Graves: Well, we really don't care to press it. We would like to effer it, though, and if the Court desires to look over it, and if we, in the course of argument can point out in any way, it might have that—serve that purpose—we would like for the Court to reserve the ruling on it.

Judge Sibley: Well, do you all want it in or out?

Mr. Lewis: If the Court please, we have no great objection, but there have been no pleadings attacking the findings of the Commission in that respect. We lodge an objection to it on that basis, that it is immaterial and irrelevant.

Judge Sibley: We are in the position of a reviewing Court for the Commission. It might be that we ought to know what they decided on, but if we are here as an outside power trying to enforce the Constitution of the United States, I don't think we would have any business with what was proven there.

Judge McMillan: If you had attacked that order on the ground that they didn't have a fair hearing, and there was no evidence introduced before them to support the order, you might come up under the Supreme Court decisions, but you have no such attack on it, so what is the

use of putting that record in evidence?

[fok 514] Mr. Graves: I doubt if it would become material except on one feature, that we think isn't in the case, and that is the rate feature of the case, and we think that—

Judge McMillan: Is there any ambiguity in the order that has to be explained? The order speaks for itself.

Judge Sibley: What sort of hearing there was would be primarily fixed by the notice required. You have got the notice here.

Mr. Graves: Yes, sir. There was one circumstance that happened at the hearing that I might mention at the outset, and having that notice, we called on the Commission at the outset of the hearing to advise us what statute they relied on for the basis of the promulgation of the order that they had originally issued, which was the matter that we thought would be heard again and the Commission, the record shows, that we got no response on that question, and we called on the gentlemen who had inaugurated the matter, counsel for the Pullman conductors' organization, and we got no response, and we think it is cumulative of the fact that at that time we didn't have any notice that it was contemplated that it would be a rate hearing.

Judge Sibley: Well, in the absence of any more definite purpose stated, we will rule it inadmissible.

Mr. Graves: We except.

[fol. 515] Judge Sibley: Have the other matters been put

in shape?

Mr. Graves: We are offering these two matters here that counsel has indicated that they do not object to as to form, but they have some objection as to the substance of it.

Judge Sibley: Well?

Mr. Graves: And I would like to offer the two memoranda in evidence as being the resume of the affidavits, and as representing what the witnesses would testify if they were here.

Mr. Morgan • He has two instruments, one he calls consist of trains, to which we have no objection.

Judge Sibley: Which trains are those?

Mr. Morgan: Those are the trains, involved in the-

Judge Sibley: Seventeen runs.

Mr. Morgan: Seventeen operations, I think, aren't they, Judge? The other seems to be a short form of statement of different witnesses, and as to the passenger miles per

annum, average coach rate, the average first class rate, and the difference. I assume from what counsel has said that this is offered on the theory that if this rate feature should be enforced that—

Judge Sibley: What they would lose by it.

Mr. Morgan: What they would lose by it, and we think that is immaterial and not a proper criterion, and there [fol. 516] are other methods that might be employed. There is no way to tell, in the absence of a test, as to just what the results would be, and therefore, at this time we think it wholly immaterial to any issue.

Judge Sibley: I think it might have some bearing on the reasonableness of the action taken. We will let it in.

Mr. Morgan: Note our exception.

Mr. Lewis: Your Honor, may be adopt that objection? Judge Sibley: All right, sir.

(Thereupon said instruments were admitted in evidence as Plaintiffs' Exhibits Nos. 17 and 18, respectively.)

Mr. Graves: The plaintiffs, and Intervener Plaintiffs vill close, Your Honor.

[fol. 516 A]

CLOSE OF TESTIMONY

PLAINTIFF'S EXHIBIT No. 17

(Endorsed in ink) No. 38 Civil

Filed Feb. 20, 1940 Maxey Hart, Clerk

Pullman Line No.	Consist of Train	Crew 4 .
3128 T&NO RR CO. (Affidavit of J. H. Walsh, Supt.)	Baggage Car Pullman Car Combination Coach	Train Conductor Brakeman or Flagman Pullman Porter
3015 AT&SF Ry. Co. Affidavit of J. W. Murphy, Trainmaster	Pullman Car Two day coaches	Train Conductor Brakeman or Flagman Pullman porter
3010—BSL&W Ry. Co. Affidavit of A. C. Jackson, Asst. Genl. Passenger Agent and A. B. Kelly, Asst. Genl. Mgr.	Pullman Car Three passenger cars	Train Conductor Train Porter Flagman Pullman Porter
3748—SAU&G RR CO.	Pullman car Two Passenger cars	Train Conductor Train Porter Flagman Pullman Porter
3723—ST. LB&M Ry. Co.	Pullman Car Two Passenger Cars	Train Conductor Train Porter Flagman Pullman Porter

# PLAINTIFF'S EXHIBIT No. 17

Pullman Line No.	Consist of Train	Crew  Train Conductor Flagman Train Porter Pullman Porter  Train Conductor Flagman Train Porter Pullman Porter	
3501—T&P Ry. Co. (Affidavit by W. T. Long, Jr., Supt. of Trans.)	Texarkana to Marshall: Pullman Car Two Day Coaches Mail & Baggage Cars  Marshall to Texarkana		
3531	Pullman Car One Day Coach Mail & Baggage Car		
3076 (Affidavit of T. W. Bowdry, Genl. Pass. Agent of CRI&P Ry. Co.)	Pullman Car One Cafe Coach Mail and Baggage Car	Train Conductor Brakeman Pullman Porter	
(bl. 516-B] 3265—MK&T Affidavit of F. B. Griffin, General Passenger Agent	Pullman Car Two Coaches	Train Conductor Flagman Train Porter Pullman Porter	
3251	Pullman Car Two Coaches	Train Conductor Flagman Train Porter Pullman Porter	
3258	Pullman Car Two Coaches	Train Conductor Flagman Pullman Porter	
3273	Pullman Car Two Coaches	Conductor Flagman Train Porter Pullman Porter	
3424—St. LSF&T RY, Co. Affidavit of C. J. tephenson, Vice Pres. Genl. Manager)	Pullman Car Combination baggage mail car Coach Diner-Lounge	Train Conductor Brakeman Train Porter Pullman Porter	
3370—St. L. SW Ky. Co. affidavit of E. Rhone, asst. Supt.	Pullman Car Passenger Car Cafe-Lounge Car	Train Conductor Flagman Train Porter Attendant in charge Cafe-Lounge Car Pullman Porter	
3175 CCS Ry. Co. Affidavit of F. H. Hooper, Supt. of Southern Division		Conductor Brakeman or flagma: Train Porter Pullman Porter	
3010 2&SF Ry. Co. Affidavit of H. R. McKee, Division Supt.	Pullman Car Two day coaches Diner Mail, Baggage & Express Car	Train Conductor Flagman Pullman Porter	
3106 W&DC RY Co. General Passenger agent—F. D. Daggett	Pullman Car Two day coaches Dining Car	Train Conductor Flagman Pullman Porter	

[fol. 516-C]

# PLAINTIFF'S EXHIBIT No. 18

Endorsed: No. 38 Civil Filed February 20, 1940 Maxey Hart, Clerk

	laxey Hart, C	lerk °		
Name of Affiant and Railroad	Passenger Miles Per Annum	Average Coach Rate	Average First-Class Rate	Differ- ence
Accounts AT&SF Ry. Co.	В.		,	
AT&SF Ry. CO. Line 3015 AT&SF Ry. Co. Line 3010 P&SFe Ry. Co.	107,862			2 560.00 2,762.00
L. A. Fritts, Auditor, Freight and Passenger Accounts BSL&W. Ry. Co. Pullman Line 3010	242,096	1.65¢ 242,096	2.30¢ 5 x .65 equals	.65¢ \$1,573.63
SAU&G RR CO. Pullman Line 3748	332,059	1.65	2.30 2.65 equals	.65 \$2,158.39
St. LB&M Ry. Co. Pullman Line 3723	73,009	1.65.		.65
L. W. Prior, Auditor Freight & Passenger Receipts I&GN RR CO. Pullman Line 3309	91,317	1.54	2.05 x .51 equals	\$ .51 \$ 465.72
[fot. 516-D]			•	
G. W. Danner, Auditor, T&P Ry. Pullman Line 3501	130,856	1.65	2.30 x .65 equals	.65 \$ 850.56
Pullman Line 3531	248,252	1.65	2.39 x .65 equals	.65
M. E. Pierce, Auditor Pass. Traffic— CRI&P Ry. Co. Pullman Line 3076	1,126,400 °	Loss	<b>/\$2</b> ,987.63	
O. H. Bower, Auditor MK&T RR Co Line 3251 Line 3258 Line 3265 Line 3273	500,050 155,590 916,265 12,695			.451
		.451 equals \$7	,146.55	6
B. B. Lewis, Auditor, St.L-SF&T Ry. Co.			- 0	
Line 3424	16,594	\$.017477 16,594 x	\$.021334 \$.003857 equ	\$ .003857 als \$64.01
W. G. Buechner, Auditor of Revenue KCS Ry. Co. Line 3175	1,182,124	Loss		\$ 503.60
O. D. Weaver, Auditor of Revenue RW&DC Ry. Co. Line 3106	436,672	.018¢ 436,672 x	.0203 .0023 equals	.0023

### Plaintiff's Exhibit No. 18, Cont'd.

Name of Affiant and Railroad	Number of Revenue • Rail Tickets Honored	Proportion of Revenue Accruing Between Texarkana and Dallas	Proportion of Revenue that Would Accrue on same tickets if Coach Fare Basis were Assessed	Difference in Revenue to St. L. SW Ry. of Tex. Between Texarkana and Dallas for Twelve Months Period
A. R. Wood Auditor for Trustee, St. L-S. W. Railway Company		• • • •		
Pullman Line 3370	1,133	\$4,429.37	3,279.20	\$1,150.17
J. T. Monroe, Pas-		ween Ennis and	d Ft. Worth	
senger Traffic Man- ager Pullman Line 3128	2,559	\$2,933.84	\$2,143.62	\$790.22

[fol. 517] Reporters' Certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]



[fol/518] IN UNITED STATES DISTRICT COURT FOR THE WEST-ERN DISTRICT OF TEXAS, AUSTIN DIVISION

Civil Action No. 38

The Pullman Company, et al., Plaintiffs,

V

THE RAILROAD COMMISSION OF TEXAS, et al., Defendants

Before Sibley, Circuit Judge, and McMillan and Allred, District Judges.

Opinion-Filed April 3, 1940

Per Curiam:

The Pulman Company and a large number of Railway Companies operating in Texas and Trustees in charge of Railways operating in Texas bring this suit against the Railroad Commission of Texas, the various members thereof and the Attorney General, to restrain the enforcement of a

certain order made by the Commission on the 4th day of November, 1939.

The order purports to be made pursuant to the statutes of the State of Texas and a sum in excess of the jurisdictional amount is shown to be involved. The ground of attack is the unconstitutionality of the order. A temporary restraining order was applied for and granted. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

Upon the trial, without objection on the part of anyone, leave was granted to three Pullman porters and to three Pullman conductors to intervene. The Pullman porters made common cause with the plaintings and the Pullman conductors aligned themselves with the defendants.

[fol. 519] The order complained of is long and contains some twenty-nine very extensive findings of fact. These are followed by certain recitals labeled as orders and certain decrees with regard to rates which may be charged under certain circumstances by the Railroads and the Pullman Company. However, the gist of the order and the provision which is particularly assailed and which it is manifest it was the prime purpose of the order to put into effect, is as follows:

"It Is Further Ordered, Adjudged and Decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

Plaintiffs make their attack upon a great many grounds. It is unnecessary to mention more than two or three of them. It is first asserted that the order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas. It is said, second, that in so far as it purports to relate to transportation rates, it is void for the reason that it was issued without notice of a hearing for such purpose. It is further contended that the order is unjust, arbitrary, unsupported by any basis in fact and, accordingly, confiscatory. Defendants joined issue with plain-

tiffs upon these matters and evidence was introduced at great length by both sides.

It appears without contradiction that there are some sixteen or seventeen routes in Texas where the Pullman cars, so far as the Pullman Company is concerned, are in charge of a porter. In most cases, this occurs only where the distance traversed is short, and it is invariably true that it occurs only in instances where there is only one Pullman car on the train. The general control of the Pullman car [fol. 520] and the passengers therein is lodged in the Railroad conductor. On trains where two or more Pullman cars are being carried contemporaneously, a Pullman conductor is in charge, subject, however, to the train conductor.

We are confronted at the outset by the question as to what authority the Railroad Commission has to make the challenged order. The Railroad Commission is a creature of statute. It gets no authority by implication or from the common law. It is given the authority by statute to correct abuses, but the Texas courts have been uniform in holding that the abuse must be one defined by law. In Railroad Commission v. H. & T. C. Ry. Co., 90 Texas, at page 352, the Supreme Court says:

"The question then arises, What abuses can the Railroad Commission correct? We think that it must be some abuse which has been defined by the law, and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation."

In State v. Sugarland Ry. Co., 163 S. W. 1047 (writ refused), the Court said:

"The Commission is a creature of the statute, based upon constitutional provision for the establishment of an agency in this state, with such powers as may be deemed adequate and advisable. Section 2, Art. 10, Const. of Texas. Being a creature of statute, with such powers only as the Legislature deemed adequate and advisable, it could deraign no authority by implication or from the common law. See Railroad Commission v. G., H. & S. A. Ry. Co., 51 Tex. Civ. App. 447, 112 S. W. 353. An order of the Commission, to be valid, must be based upon some express provision or delegation of power made by statute. R. R. Com. v. G., H. & S. A. Ry., supra; I. & G. N. R. R. Co. v. R. R. Com., 99 Tex.

332, 89 S. W. 961. We think that, before the appellee could claim the protection of such order, it must be able to put its finger upon the statute conferring upon the Commission the authority to make the same, which has not been done."

· See also State v. St. L. S. W. Ry. Co., 165 S. W. 491. [fol. 521] There is no Texas statute which forbids the operation of a train carrying a Pullman car without a Pullman conductor, nor is there any statute that defines such action as an abuse. The Legislature has fixed the necessary members of a train crew and a Pullman conductor is not included. Article 6380, Vernon's Annotated Texas Statutes, 1925. Defendants do not deny the correctness of the law as set out in the decisions quoted from. In fact they state, upon page 13 of their brief, that they concur in those views. Being called upon to put their finger upon the statute which authorizes the making of an order of this kind, they point to Article 6474. That Article does not denounce the transportation of a Pullman car without a Pullman conductor as an abuse, but relates to the matter of unjust discrimination and defines certain things which shall, under its terms, constitute unjust discrimination. It is summarized by defendants in their brief as follows:

"A duty is imposed on the railroads not to give any undue or unreasonable preference to any person or locality or subject any traffic to any disadvantage whatsoever, and a penalty is prescribed for failing to observe such duty."

We are not of the opinion that the order is sustained by the provisions of this statute. It will be noted that the statute denounces unjust discrimination. The Supreme Court of Texas, in construing Section 2 of Article 10 of the Constitution, upon which the statute is based, said, in St. Louis Southwestern Railway Co. v. State of Texas, 113 Texas, at page 579:

"But, whatever meaning should be ascribed to the word unjust, two things seem perfectly plain in construing Section 2 of Article X, of the Constitution, towit: first, that all discrimination in passenger fares was not forbidden, but only such as would operate unjustly."

It is certainly not an unjust discrimination to adapt the service to different conditions of traffic. Every train is not required to be the duplicate of every other train in order to avoid unjust discrimination. The record in the case fails

to support the contention that there is any unjust discrim[fol. 522] ination as against the public generally by reason
of the fact that on certain trains where only one Pullman
car is being handled, the operation, so far as the Pullman
Company is concerned, is in charge of a porter, who is subject to the direction and control of the train conductor.
However, without regard to these matters, the order cannot be upheld as a correction of an unjust discrimination,
because it is not within the Legislative definition of that
term and the Commission is without power to make one
of its own.

· As we have heretofore noted, it cannot stand as a correction of an abuse, because the so-called abuse has not been

defined or prohibited by law.

The regulation cannot be sustained as a rate order for the reasons, first, it was not made after notice given as required by law, and second, it is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and the Pullman Company, which it is without any statutory authority to do. Furthermore, in so far as it attempts to regulate the rates charged by the Pullman Company, it is void, as the Commission has no jurisdiction over the Pullman Company.

The intervenors Pullman conductors have raised on their own account certain jurisdictional questions, predicated upon the assertion and assumption in some instances that plaintiffs are operating their railroads in Texas in violation of the law. If it be conceded that, as intervenors, they have the right to question the propriety of the main proceeding in this fashion, we are still of the opinion that their contention is without merit and should be overruled.

The views which have been expressed make it unnecessary to rule on the question as to whether the order is arbitrary. The Commission being without statutory authority to make [fol. 523] an order of this character, the question as to its reasonableness is immaterial.

It accordingly follows from what has been said that a decree should be entered for the plaintiffs, and its terms may be settled after notice.

(S) Saml. H. Sibley, Circuit Judge. James V. Allred, District Judge. Robert J. McMillan, District Judge.

[File endorsement omitted.]

[fol. 524] IN UNITED STATES DISTRICT COURT FOR THE WEST-ERN DISTRICT OF TEXAS, AUSTIN DIVISION

### Civil Action'No. 38

THE PULLMAN COMPANY, et al., Plaintiffs,

THE RAILROAD COMMISSION OF TEXAS, et al., Defendants

FINAL JUDGMENT—Filed April 23, 1940

This action came on to be heard on February 17, 1940, at this term, on the plaintiffs' motion for preliminary injunction, and at the same time on final trial on the merits, before a statutory court of three judges consisting of Sibley, Circuit Judge, and McMillan and Allred, District Judges; and, upon conclusion of the evidence, was argued by counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz:

- 1. That the defendants' motions to dismiss the action be and are hereby overruled.
- 2. That the defendants, the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson and Jerry Sadler, members of said commission, and Gerald C. Mann, Attorney General of the State of Texas, their respective successors. agents, representatives and employees, be and they are, each and all, hereby permanently enjoined from attempting to enforce against the plaintiffs, or any of them, the order of the Railroad Commission of Texas dated November 4, 1939 (Railroad Commission Docket No. 3669-R, an "Order amending passenger circular No. 164, issued by the Railroad [fol. 525] Commission of Texas on the 8th day of August, 1939") and the order of the Railroad Commission of Texas dated the 8th day of August, 1939, known as Passenger Circular 164, copies of which are attached to the Amended Complaint as Exhibit F and Exhibit A, respectively; and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or otherwise, for the violation of said orders, or any part thereof; and from taking any steps whatsoever looking to the enforcement of said orders, and from seeking in any way to penalize plaintiffs, or any of them, for violating or not obeying said orders, or any part thereof.

3. All costs incurred by the intervening defendants, or occasioned by their intervention, are taxed against said intervening defendants, M. B. Cunningham, W. A. Worley and W. M. Hadley. All other costs are taxed against the defendant the Railread Commission of Texas.

To all of which judgment the defendants, including the intervening defendants, duly excepted.

Done this 23rd day of April 1940.

(S) Saml. H. Sibley, Circuit Judge. Robert J. Mc-Millan, District Judge. James V. Allred, District Judge.

## Approved as to form:

Claude Pollard, Ireland Graves, Attys. for Plffs.

Cecil C. Rotsch, Assistant Attorney General of Texas, Attorney for the Railroad Commission of Texas, the members thereof and the Attorney General of Texas.

Cecil A. Morgan, Attorney for intervening defendants.

Ent: Civ. O. B., Vol. 1, p. 93.

(File endorsement omitted.)

## [fol. 526] IN UNITED STATES DISTRICT COURT

## [Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 11, 1940

## FINDINGS OF FACT

1. The Pullman Company and a number of railway companies operating in Texas and trustees in charge of railways operating in Texas bring this suit against the Railroad Commission of Texas, the members thereof and the Attorney General of Texas, to restrain the enforcement of a certain order made by the Commission on November 4, 1939. In issuing the order the Commission purported to act pursuant to Texas statutes, and a sum in excess of the jurisdictional amount is shown to be involved. The order is challenged on constitutional grounds. A temporary re-

straining order was applied for and granted, and the plaintiffs continued to press for preliminary injunction. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

- 2. The complaint charged, and the proof shows, that the amount in controversy exceeds \$3,000.00, exclusive of interest and costs. Compliance with the challenged orders would devolve upon The Pullman Company an annual gross expense of approximately \$41,000.00, or an annual net ex-[fol. 527] pense of approximately \$36,000.00; and by virtue of certain contracts between The Pullman Company and the railroad companies, a portion of this expense would be passed on to the railroads, but The Pullman Company would ultimately suffer a net annual expense of approximately \$25,000.00.
- 3. Upon the trial, without objection, leave was granted to three Pullman porters to intervene as plaintiffs and to three Pullman conductors to intervene as defendants. Each of the porters receives extra compensation of \$13.50 per month if on any part of his run he acts as porter-incharge. If the order of the Railroad Commission, complained of herein, is enforced, the intervening plaintiffs and other porters operating in Texas as porters-in-charge will lose such extra compensation; and their retirement pay will in consequence be reduced.
- 4. The order complained of (a copy of which appears as Exhibit F appended to the Complaint) contains twenty-nine findings of fact, followed by certain recitals labeled as orders and decrees. The attack upon the order was concentrated, in main, upon a section, manifestly expressing the prime purpose and object sought to be accomplished by the Commission, reading as follows:
- "It Is Further Ordered, Adjudged And Decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

- 5. The order is challenged on the grounds, among others (a) that it is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas, and (b) that, in so far as it purports to relate to transportation rates, it is void for the reason that it was issued without notice of a hearing for such purpose, and (c) that it is unjust, arbitrary, unsupported by any basis in fact and, hence, confiscatory. Issue was joined [fol. 528] on all these matters and evidence was introduced at great length by both sides.
- 6. It appears without contradiction that there are seventeen routes or lines in Texas where Pullman cars, in so far as The Pullman Company is concerned, are in charge of a porter. In most cases this occurs only where the distance traversed is short, and in every instance it occurs only on those trains that, as regularly operated, carry only one These lines are described in Exhibit G at-Pullman car. tached to the Complaint. One of them, however, No. 3259, was discontinued prior to the trial. On trains carrying two or more Pullman cars a Pullman conductor Accompanies the train. In all instances, however, the general control of the Pullman car or cars and passengers therein is lodged in the railroad conductor. The entire train and the railroad employees and Pullman employees are subject to the jurisdiction of the train conductor.
- 7. All of the Pullman porters in Texas are negroes who have been in the service of the company as porters for more than ten years, and those acting as porters-in-charge for longer terms, ranging from twenty years to thirty-four years of continuous service. The men serving as porters-incharge on the lines in Texas described in Exhibit G have demonstrated that they are substantial, reliable men of good character and good intelligence. By training and experience they are qualified and competent to discharge the duties assigned to them as porters-in-charge; and the fact that they are negroes and are called porters-in-charge does not disqualify them or render them incompetent. The service rendered to passengers in the Pullman cars on the trains not accompanied by a Pullman conductor is in no way inferior to the service rendered on the trains accompanied by a Pullman conductor. The Pullman conductors and the porters-in-charge have had the same training, and they receive regularly the same instructions. There is no need

[fol. 529] of a Pullman conductor in addition to the porters-in-charge on the lines described in Exhibit G. In view of the Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7.

### CONCLUSIONS OF LAW.

- 1. While the challenged orders are directed in terms against the railroads, The Pullman Company is directly affected. The railroads cannot place a Pullman conductor on the Pullman cars except by requiring The Pullman Company to do so. Consequently, The Pullman Company has the requisite interest to challenge the orders. The matter in controversy as to The Pullman Company is the right to carry on its business free of the prohibition of the order. The value of such right is shown to be in excess of \$3,000.00, exclusive of interest and costs. Buck v. Gallagher, 307 U. S. 95, 100; Packard v. Banton, 264 U. S. 140, 142; Western & Atlantic R. R. v. Railroad Commission of Georgia, 261 U. S. 264.
- 2. Since the order is directed in terms against the railroads and not against The Pullman Company, the only way in which The Pullman Company can obtain effective relief is by means of an injunction prohibiting enforcement of the challenged orders against the railroads. For this reason and for the further reason that the order undertakes to determine, and interferes with, the rights of The Pullman Company in its contracts with the railroads, the railroads are necessary and proper parties to this action. Rule 19, Federal Rules of Civil Procedure; Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77, 81-82; see also Troy v. Whitehead, 222 U. S. 39, 41; Ducker v. Butler, 104 Fed. (2d) 236, 238 (App. D. C. 1939).
- [fol. 530] 3. The motions to dismiss the action on the ground of misjoinder are not well taken and should be overruled. Rule 21, Federal Rules of Civil Procedure, and authorities above cited.
- 4. The orders of the Railroad Commission are challenged on substantial Federal constitutional grounds, and this Court has jurisdiction to determine all questions at issue, local and Federal.

- 5. The Railroad Commission of Texas is a creature of statute, and it has such powers as have been validly conferred by the statutes of Texas. It derives no powers from the common law or by implication. State v. Sugarland Railway Co. (Tex. Civ. App.), 163 S. W. 1047, 1049 (writ of error refused).
- 6. The challenged orders, Passenger Circular 164 of August 8, 1939, and the amendment thereof, namely, the order of November 4, 1939, are not within the powers delegated to the Railroad Commission of Texas by statute. Because they are not sanctioned by law, they are void.
- 7. The power to issue the challenged orders is not derived from Article 6445, Revised Civil Statutes of Texas, 1925. The abuses, the correction of which is committed to the Railroad Commission, are only those abuses that have been denounced by statute as such or that have been prohibited by the Legislature. Railroad Commission v. H. & T. C. Ry. Co., 90 Tex. 340, 352; 38 S. W. 750, 754; State v. St. L. S. W. Ry. Co. (Tex. Civ. App.), 165 S. W. 491, 496 (writ of error dismissed).
  - 8. No Texas statute has defined as an abuse, or prohibited, the operation of a sleeping car that is not continuously in charge of a Pullman conductor in addition to the train conductor.
  - 9. The challenged orders are not within the authority delegated to the Railroad Commission by Article 6474, Revised Civil Statutes of 1925. The operation of the sleeping car on such trains as those described in Exhibit G; in charge of a Pullman porter, subject to the supervision, direction and control of the train conductor, does not [fol. 531] amount to unjust discrimination as defined in said statute. The Railroad Commission has no authority to add to the definition. The statute does not require that every train be made the exact duplicate of every other train. It is not unjust discrimination to adapt the service to the varying traffic conditions.
  - 10. Discrimination is not denounced by statute unless it is unjust. The underlying provision of the Texas Constitution (Sec. 2, Art. X), upon which the statute, Article 6474 is based, does not forbid discrimination, even in respect to passenger fares, unless it is unjust discrimina-

tion. St. L. S. W. Ry. Co. v. State of Texas, 113 Tex. 570, 579.

- 11. The Texas Legislature having enacted a full crew law prohibiting the operation of any passenger train with less than a full crew consisting of four persons, one engineer, one fireman, one conductor and one brakeman, the Railroad Commission of Texas has no authority to supplement or augment the full crew statute. The statute is a penal one and cannot be extended by implication. Railroad Commission v. T. & N. O. Railroad Co. (Tex. Civ. App.), 42 S. W. (2d) 1091, 1093 (writ of error refused).
- 12. The order of November 4, 1939, cannot be sustained as a rate or er for several reasons: (a) It was not made after notice as required by law. Art. 6449, R. C. S. 1925, requires ten days' notice to each railroad to be affected by an order fixing rates. No notice was issued indicating that at the hearing of August 8, 1939, rate matters would be considered. (b) The rate features of the order are apparently predicated 'upon the Commission's assumed authority to construe and enforce the contracts between the railroads and The Pullman Company, as to which the Railroad Commission has no authority. (c) In so far as the order attempts to regulate rates charged by The Pullman Company, it is void, since the Railroad Commission of Texas has no jurisdiction over The Pullman Company [fol. 532] and no authority to regulate Pullman rates. This question was expressly decided in the case of The Pullman Company v. Railroad Commission, No. 1791, Equity, United States District Court, Northern District of Texas; affirmed without written opinion by Circuit Court of Appeals, Fifth Circuit (1908). Since then the statutes have been readopted in the 1911 Code and in the 1925 Code without change in that respect.
- 13. In their briefs filed after the evidence was concluded, the Pullman conductors (intervenor defendants) raised on their own account certain jurisdictional questions, predicated, in some instances, upon the assertion and assumption that plaintiffs are operating their railroads in Texas in violation of the law. If it be conceded that, as intervenors, they have the right to question the propriety of the main proceeding in this fashion, we are still of the opinion that their contention is without merit and should be overruled.

- 14. Since the orders are not within the Railroad Commission's statutory powers, we find it unnecessary to dispose of the Federal constitutional questions. Siler v. L. & N. R. R. Co., 213 U. S. 175, 193.
- 15. We conclude that defendants' motions to dismiss the action should be denied; and that plaintiffs are entitled to judgment as prayed for.

This the 11th day of June, 1940.

(S.) Saml H. Sibley, United States Circuit Judge;
Robert J. McMillan, United States District Judge;
James V. Allred, United States District Judge.

[File endorsement omitted.]

[fol. 533] IN UNITED STATES DISTRICT COURT.

[Title omitted]

PETITION FOR APPEAL—Filed June 18, 1940

To the Honorable Judges of the District Court of the United States for the western district of Texas:

Your petitioners The Raifroad Commission of Texas, and the individual members thereof, namely Lon A. Smith, Jerry Sadler and Ernest O. Thompson, the Attorney General of Texas, Gerald C. Mann, together with M. B. Cunningham, W. M. Hadley and W. A. Worley, intervening defendants, respectfully show:

The plaintiffs The Pullman Company and fifteen rail-roads joined together as plaintiffs and filed a Bill of Complaint in the United States District Court, Western District of Texas, on the 22 day of November, 1939, against The Railroad Commission of Texas, the three members thereof, and the Attorney General of Texas, to restrain the enforcement of a certain order made by the Commission on the 4th day of November 1939. Several grounds of attack were made, including the unconstitutionality of the order. An interlocutory order was applied for and granted. A copy of the same has been attached hereto, marked Exhibit "A" and made a part hereof. Accordingly, a case for three judges under Section 266 of the Judicial Code was presented and the court was assembled and the case tried on its merits

by a 3-Judge Court on the 17th day of February 1940. Said [fol. 534] 3-Judge Court caused to be entered a final judgment on the 23 day of April 1940, a copy of which final judgment has been marked Exhibit "B", attached hereto, and made a part hereof, which permanently enjoined The Railroad Commission of Texas, the individual members thereof, and the Attorney General of Texas, their respective successors, agents, representatives and employees from enforcing the order of November 4, 1939, which said final judgment further provided "to all of which judgment the defendants, including the intervening defendants, duly excepted." The court also rendered an opinion favorable to the plaintiffs, a copy of which opinion has been marked Exhibit "C", attached hereto, and made a part hereof.

. The said final judgment is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignments of error and prayer for reversal, filed with the clerk pursuant to Rule 9 of the Rules of the United States 'apreme Court; and there has been likewise filed herewit' a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray for the allowance of an appeal in said cause to the Supreme Court of the United States agreeably to the statutes and rules of said Court in such cases made and provided, and that a proper order touching the security required of the petitioners may be made.

Dated this the 18 day of June, 1940.

Gerald C. Mann, Attorney General of Texas, Cecil C. Rotsch, Glenn R. Lewis, Lee Shoptaw, Attorneys for The Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest O. Thompson, and Gerald C. Mann, Attorney General of Texas. By Cecil C. Rotsch.

A. B. Culbertson and Cecil A. Morgan, Attorneys for intervening defendants, M. B. Cunningham, W. M. Hadley and W. A. Worley. By Cecil A. Morgan.

[fols. 535-548] [File endorsement omitted.]

[fol. 549] IN UNITED STATES DISTRICT COURT

[Title omitted]

Assignments of Error-Filed June 18, 1940

The appellants assign the following errors in the record and proceedings in this case:

1

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, their motion to dismiss and their motions relating to misjoinder of causes of action, misjoinder of parties-plaintiff, and an unlawful delegation of chartered rights from the railroad companies to The Pullman Company in that:

(a) The court had no jurisdiction to entertain a bill in equity wherein the plaintiffs pleaded that they were engaged in an illegal and unlawful enterprise in that the railroad companies by contract attempted to delegate a part of their charter powers to a foreign corporation, namely, The Pullman Company, in view of the mandatory provisions of Article 6260 Revised Civil Statutes of Texas which requires that only corporations chartered under the laws of the State of Texas to operate a railroad may operate railroads in this state and the damages as alleged by the plaintiffs to sustain jurisdiction were based upon interfering with the rights of the railroad companies and The Pullman Company under such invalid contracts.

[fol. 550] (b) The court had no jurisdiction to entertain the plaintiffs' bill which pleaded that some of the plaintiffs resided in the State of Texas and others resided without the State of Texas and it was not alleged with certainty the specific damage, if any, suffered by each of said plaintiffs.

9

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding that the Railroad Commission was without authority to promulgate the order complained of in that Article 6473 Vernon's Annotated Statutes provides "if any railroad company \* \* \* shall charge, collect, demand, or receive a

greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars \* \* \* or for any other services performed or to be performed by it, such railroad company \* \* \* shall be deemed guilty of extortion'. The pleadings and proof of the plaintiffs clearly established that the railroads of Texas by contract with The Pullman Company, a foreign corporation, were charging rates, fares and tolls for the transportation of passengers and sharing in them that had not been fixed or promulgated by the Railroad Commission, and in this manner the plaintiffs are clearly violating the law, and should have no standing in a court of equity seeking equitable relief to establish and protect them in such violation.

3

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in not sustaining the defendants' motions to dismiss the plaintiffs' Bill of Complaint because it was pleaded by the plaintiffs that the railroad companies had delegated to The Pullman Company a part of their charter powers, and in this indirect way the railroad companies were charging fares, tolls and rates for themselves in an amount in excess of the maximum sum allowed by the statutes of the State of Texas [fol. 551] and in this manner the railroad companies were doing indirectly what they cannot do directly by engaging in an ultra vires transaction and in a court of equity seek refuge and protection.

4

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding that the order complained of by the plaintiffs as promulgated by the Railroad Commission of Texas was made without statutory authority on the part of said Commission in that the laws of the State of Texas are mandatory in requiring that said Commission make rules and regulations governing railroads, namely Article 10, Section 2 of the Constitution and Article 6445 Pevised Civil Statutes, and specifically provide that no railroad shall be operated in the State of Texas, unless such company is chartered under the laws of said state as set forth in Article 6260 Revised

Civil Statutes, and it is further made the duty of said Commission by Article 6474 which provides:

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever."

## Article 6445 provides:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks, and other property used in connection therewith in this State, and over all persons, associations and corporations, · private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls [fol. 552] of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law.".

5

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in issuing

a permanent injunction against the Railroad Commission of Texas, and the Attorney General, enjoining such state departments from carrying into effect regulations promulgated by the Railroad Commission for the safety, care, comfort, convenience, proper accommodation, charges, fares and transportation of passengers on sleeping cars and Pullman cars within the State of Texas and to prevent unjust abuses, discrimination and extortion in rates. By granting said permanent injunction the court substituted its own opinion for that of the Railroad Commission of Texas.

6

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code erred in holding that the Railroad Commission was without authority to promulgate, a rate order in that Article 6448 Revised Civil Statutes imposes the duty upon the Railroad Commission to fix the rates of all railroads for both freight and passengers. Article 6449 Revised Civil Statutes provides that ten days notice of such hearing shall be a sufficient notice. In connection therewith it is to be noted that the "challenged order" recites on its face that notice was issued on the 19th of August and the hearing held on the 31st of August and further recites that "the Commission thus finds that all parties interested in the subject matter have been duly notified for the time and in the manner provided by law."

The ruling of the court is in conflict with the decisions of the State of Texas on the point of notice and hearing of rates in that such an attack as made in the case at bar is a [fol. 553] collateral attack on the question and the Supreme Court of Texas announced the rule in Texas Steel Company vs. Fort Worth & Denver City Ry. Co. et al., 45 SWR (2nd) 794, that a collateral attack could not be made upon an order fixing rates that were promulgated by the Railroad Commission of Texas.

7

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding that the attempts of the Railroad Commission to regulate the rates charged by The Pullman Company were void and in stating that "The Commission has no jurisdiction over The Pullman Company" in that Title 71,

Chapter 4, Revised Civil Statutes 1925, Article 4477 imposes the mandatory duty upon the Railroad Commission of Texas to enforce the Public Health Sanitary Code, and among other requirements is the one relating to:

"Each depot, railway coach, sleeping car, interurban car and street car while in use for the accommodation of the public shall be properly ventilated, and, if necessary, heated, and a sufficient amount of heat shall be furnished in time of need so that fresh air can be supplied without causing it to become unduly uncomfortably cold; and the janitor, conductor or other person in charge shall see to it that the air is replenished with fresh air from time to time as needed to prevent the same from becoming foul, unsanitary and oppressive."

8

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding that the Railroad Commission had no authority to regulate the rates to be charged by The Pullman Company for the reason that all railroads that do business in Texas must be chartered under the laws of the State of Texas and by virtue of Chapter 11, Title 112, Revised Civil Statutes, such railroads are definitely under the direct supervision and regulation of the Railroad Commission; thus by contract between the railroads and The Pullman Company the railroads cannot delegate their chartered powers derived from the state and by contract grant authority to The Pullman Company powers not [fol. 554] granted to the railroad companies by the state, and thus create an agency free of regulation by the Railroad Commission without boundaries or limitations as to its rates, rules or regulations.

0

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in entering judgment on April 23, 1940, permanently enjoining the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson, and Jerry Sadler, members of said Commission, and Gerald C. Mann, Attorney General of the State of Texas, their respective successors, agents, representatives, and employees, from attempting to enforce

against the plaintiffs the order of the Railroad Commission of Texas, dated November 4, 1939, (Railroad Commission Docket No. 3669-R; and "Order Amending Passenger Circular No. 164, Issued by the Railroad Commission of Texas on the 8th day of August, 1939") and the order of the Railroad Commission of Texas dated August 8, 1939, known as Passenger Circular 164, and from enforcing said order, and from penalizing the plaintiffs for violating said order; because the Railroad Commission of Texas had the authority to pass and enforce said order by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses. (Article X, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority or the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses" and "to prevent \* \* \* abuses in the conduct of their business" (Adopted in 1911, and now codified as Article 6445 of the Revised Civil Statutes of Texas) and the Legislature has not left it up to the Railroad Commission to define the "abuse", but the Legislature has defined the abuse involved in this case [fol. 555] by saying that "unjust discrimination is prohibited and" it shall constitute unjust discrimination "1: If any railroad \* \* \* shall give any undue \* \* \* preference or advantage to any particular person \* \* \* or locality, or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever." (Article 6474 of the Revised Civil Statutes of Texas); and therefore, the Railroad Commission of Texas had the authority to adopt said order in question and enforce the same.

10

The said District Court, composed of three judges, as provided by Section 299 of the Judicial Code, erred in making any findings of fact of any kind, and particularly the kind it did make, because it is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better, and it is not proper for the Court to determine which witnesses should be believed and which ones should be disbelieved, but it is only a question of whether or not there is any evidence on which the Commission's judgment can be founded, and as there was

such evidence in this case the Federal Court cannot disturb or interfere with the Commission's judgment or orders.

#### 11

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in making the findings of fact set out in paragraph 7 of the court's findings of fact filed in this case, said findings of fact in said paragraph 7 beginning with the words "All of the Pullman porters in Texas", etc., and ending with the words "there is no reasonable basis for finding contrary to the facts stated in this finding No. 7"; because said findings of fact is set forth in paragraph 7 of the court's findings of fact are contrary to the evidence, and are not supported by the testimony and the evidence in this case.

# [fol. 556]

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 1 of the court's conclusions of law) that the matter in controversy as to the Pullman Company is in excess of \$3,000, exclusive of interest and costs; because such a conclusion is contrary to the evidence and the testimony in this case and contrary to the law.

### 13

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 2 of the court's conclusions of law) that the railroads are necessary and proper parties to this action; because such a conclusion is contrary to the evidence and the testimony in this case, and contrary to the law.

#### 14

The said District Courf, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 6 of the court's conclusions of law) that the challenged orders, Passenger Circular 164 of August 8, 1939, and the amendment thereof, namely the order of November 4, 1939, was not within the powers delegated to the Railroad Commission, the

reason said court erred being as follows: The Railroad Commission of Texas has authority under the laws of Texas to make and enforce such orders, because the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article X, Section 2, Constitution), and the Legislature has passed such a law, and has conferred authority upon the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses" and "to prevent \* \* \* abuses in the conduct of their business." (Adopted 1911, and now codified as Article 6445, Revised Civil Statutes of Texas), and the [fol. 557] Legislature has not left it up to the Railroad Commission of Texas to define the "abuse", but the Legistature has defined the abuse involved in this case by saving that "unjust discrimination is \* \* ... prohibited" and it shall constitute unjust discrimination "1. If any railroad \* \* \* shall give any undue \* \* \* preference or advantage to any particular person \* \* or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever", and because of said provision in the Constitution and statutes of Texas, the Railroad Commission of Texas has authority to make and enforce such order.

15

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 7 of the court's conclusions of law) that the power to issue the challenged orders is not derived from Article 6445, Revised Civil Statutes of Texas, the reason said court erred being as follows: Said Article 6445 authorizes the Railroad Commission of Texas "to govern and regulate \* \* railroads" and "to correct abuses" and "to prevent \* \* abuses in the conduct of their business," and the failure of the defendants to comply with the order in question, that is, operate sleeping cars on lines of railroads in Texas without said cars being in the charge of a Pullman conductor, and operate sleeping cars on other lines with Pullman conductors in charge, is an abuse under the facts in this case, and has been defined as an abuse by the Legislature of Texas under Article 6474 of the Revised Civil Statutes of Texas; and therefore authority to issue the challenged order is derived from said Article 6445.

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 8 of the court's conclu[fol. 558] sions of law) that no Texas statute has defined as an abuse, or prohibited, the operation of a sleeping car that is not continuously in charge of a Pullman conductor in addition to the train conductor; the reason said court erred being as follows: The Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses, and the Legislature of Texas has passed said law, to-wit, Article 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

#### 17

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 9 of the court's conclusions of law) that the challenged orders are not within the authority delegated to the Railroad Commission of Texas by Article 6474, Revised Civil Statutes of Texas. the reason said court erred being as follows: Said Article 6474 provides that if any railroads shall give any undue preference or advantage to any particular person or locality it is an unjust discrimination, and under the facts in this case the plaintiffs have been, and are now, operating sleeping cars on some lines of railroad without said cars being in charge of an employee of the rank and position of Pullman conductor, and at the same time have operated other sleeping cars on other lines of railroad with said cars being in charge of a Pullman conductor, and the operation of sleeping cars on different lines in different manners in such fashion constitutes a discrimination and an abuse in violation of said Article 6474.

#### 18

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in paragraph 11 of the court's conclusions of law) that the Texas Legislature having enacted a full crew law requiring a crew of four men on a train, the Railroad Commission of Texas thereby has no authority to pass the order in question requiring Pullman

[fol. 559] conductors to be in charge of all sleeping cars; the reason said Court erred being as follows: That said full crew law is a separate act of the Legislature and does not prevent the Railroad Commission of Texas from preventing abuses and discrimination as authorized by Article X, Section 2, Constitution of Texas and Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

19:

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in denying and overruling the defendants' motion to dismiss, and in holding (as stated in paragraph 15 of the court's conclusions of law) that the defendants' motion to dismiss should be denied, the reason said Court erred being as follows: The plaintiffs' complaint failed to state a cause of action in favor of any plaintiff against any defendant upon which relief could be granted, in this, to-wit, the complaint failed to allege that there was insufficient evidence or no evidence before the Railroad Commission of Texas to support or justify the orders in question, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable, or that said order or the enforcement thereof constituted unlawful interference with interstate commerce, or that said orders or the enforcement thereof constituted a taking of the plaintiffs' property without due process of law.

 $20 \cdot$ 

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in entering judgment on April 20, 1940, permanently enjoining the defendants from attempting to enforce against the plaintiffs the order of the Railroad Commission of Texas, dated November 4, 1939 (Railroad Commission Docket No. 3669-R, and Order Amending Passenger Cir-[fol. 560] cular No. 164, issued by the Railroad Commission on the 8th day of August, 1939) and the order of the Railroad Commission of Texas dated August 8, 1939, known as Passenger Circular No. 164, and from enforcing said orders, and from enforcing penalties for the violation

of said orders; the Court having erred for the following reasons, to-wit: The jurisdiction of the United States District Court for the Western District of Texas, where this case was tried, did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the State action complained of, to-wit, said Railroad Commission action and order and the enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours \* \* \* the Due Process Clause may place upon the exercise of the State's regulatory power"; and therefore the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes, to adopt and enforce said orders.

### 21

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in holding (as stated in the Court's opinion and in its conclusions of law and particularly in paragraph 6 of the Court's conclusions of law) that the challenged orders, Passenger Circular 164 of August 8, 1939, and the amendment thereof, namely the order of November 4, 1939, are not within the powers delegated to the Railroad Commission of Texas by statute; the Court having erred for the following reasons, to-wit: The jurisdiction of the United States District Court for the Western District of Texas, where this case was tried, did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the State action complained of, to-wit, said Railroad Commission action and order and the enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours [fol. 561] \* \* \* the Due Process Clause may place upon the exercise of the State's regulatory power"; and therefore the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes, to adopt and enforce said orders.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said decree of the Dis-

trict Court of the United States for the Western District of Texas, dated April 23, 1940, in the above entitled cause, be reversed and a decree rendered in favor of these complainants.

Gerald C. Mann, Attorney General of Texas; Cecil C. Rotsch, Glenn R. Lewis, and Lee Shoptaw, all of Austin, Texas, Attorneys for The Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest C. Thompson, and Gerald C. Mann, Attorney General of Texas. By Cecil C. Rotsch.

A. B. Culbertson and Cecil A. Morgan, of Fort Worth, Texas, Attorneys for intervening defendants M. B. Cunningham, W. M. Hadley and W. A. Worley. By Cecil A. Morgan.

[File endorsement omitted.]

[fol. 562] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 18, 1940

The petition of The Railroad Commission of Texas, and the individual members thereof, namely, Lon A. Smith, Jerry Sadler and Ernest O. Thompson; the Attorney General of Texas, Gerald C. Mann; together with M. B. Cunningham, W. M. Hadley and W. A. Worley, intervening defendants, the complainants in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Western District of Texas, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered:

It is hereby Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Western District of Texas, entered in this cause on the 23 day of April, 1940, and that the Clerk of the said

District Court of the United States for the Western District of Texas shall, within 40 days from this date, make and transmit to the Supreme Court of the United States, under [fols. 563-565] his hand and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellants shall give a good and sufficient cost bond in the sum of \$500.00 Dollars,

conditioned as required by law.

Done by the Court this 18th day of June 1940.

(S) Robert J. McMillan, District Judge.

Entered: Civ. O. B., 1, page 125.

(File endorsement omitted)

[fols. 566-567] Citation in usual form showing service on Claude Pollard and Ireland Graves filed June 18, 1940, omitted in printing.

[fols, 568-570] Bond on Appeal for \$500.00 approved and fined June 18, 1940, omitted in printing.

[fol. 571] IN UNITED STATES DISTRICT COURT

[Title omitted]

Order as to Original Papers and Exhibits on Appeal—Filed July 3, 1940

It is ordered that the following original papers and exhibits be transmitted by the clerk of this court to the Clerk of the Supreme Court of the United States in lieu of copies thereof, for the inspection of that Court, to wit:

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31,

32, 33, 34, and 35.

Dated this 29 day of June, 1940.

(S) Saml. H. Sibley, Presiding Judge U. S.

Entered: Civ. O. B., Vol. 1, page 132.

(File endorsement omitted)

25-283

#### [fol. 572] IN UNITED STATES DISTRICT COURT

#### [Title omitted]

STIPULATION AS TO RECORD ON APPEAL—Filed July 3, 1940

Pursuant to the provisions of Section 2 of Rule 10 of the Rules of the Supreme Court of the United States, it is stipulated by the parties to this action that the following parts of the record, proceedings, and evidence shall be included in the record on appeal:

1. Plaintiffs' First Amended Complaint.

2. Temporary restraining order, dated November 28, 1939.

2-a. Bond for Temporary Restraining order (omitting power of attorney and copy of temporary restraining order attached thereto).

3. Order constituting and assembling Three-Judge Court,

dated January 12, 1940.

- 4. Writ to serve copies of complaint, etc., on W. Lee O'Daniel, Governor, dated January 13, 1940, and Marshal's return thereon.
  - 5. Defendants' First Amended Motion (to dismiss).

6. Defendants' Original Answer.

7. Order of court allowing Warren J. West, et al., to intervene as plaintiffs.

8. Complaint of intervener plaintiffs.

9. Motion of M. B. Cunningham, et al., to be permitted to intervene as defendants.

[fol. 573] 10. Pleadings of interveners M. B. Cunningham, et al.

11. The reporter's transcript of the evidence certified to by H. P. Bickler and Roy J. McLean, court reporters.

12. Opinion of the court, after trial on the merits, filed April 3, 1940.

13. Final judgment, dated April 23, 1940.

14. Findings of fact and conclusions of law, dated June 11, 1940.

15. Petition for appeal, filed and dated June 18, 1940,—

Exhibits to be omitted.

16. Statement of jurisdiction as required by Supreme · Court Rule 12.

17. Assignments of error.

18. Order allowing appeal, dated June 18, 1940.

19. Notice of appeal, with date of filing, and acknowledgement of service thereof,—Exhibits to be omitted.

20. Citation on appeal, and acknowledgment of service

thereof.

21. Appeal bond, and approval thereof, dated June 18, 1940.

22. Order of the Presiding Judge directing the transmittal to the Supreme Court of certain original papers and exhibits.

23. Stipulation of the parties as to the record on appeal.

It is further stipulated by the parties to this action that, pursuant to the order of the Presiding Judge, the following papers and exhibits may be transmitted to the Supreme Court of the United States in lieu of copies thereof, to-wit:

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

Entered into and dated this 3rd day of July, 1940.

- (S) Ireland Graves, Attorney for the plaintiff, The Pullman Company, and for the intervener plaintiffs, Warren J. West, et al.
- [fol. 574] (S) Claude Pollard, Attorney for all of the other plaintiffs. Cecil C. Rotsch, Assistant Attorney General, Attorney for defendants. Cecil C. Morgan, Attorney for intervener defendants, M. B. Cunningham, et al.

(File endorsement omitted)

[fol. 575] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 576] IN SUPREME COURT OF THE UNITED STATES

#### [Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY, AND OF THE PARTS OF THE RECORD WHICH APPELLANTS THINK NECESSARY FOR THE CONSIDERATION THEREOF—Filed July 26, 1940

The appellants intend to rely upon the following points, in which it is contended by appellants that the Three-Judge District Court erred, to-wit:

- 1. The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, their motion to dismiss and their motions relating to misjoinder of causes of action, misjoinder of parties plaintiff, and an unlawful delegation of chartered rights from the railroad companies to The Pullman Company, because
- (a) The court had no jurisdiction to entertain a bill in equity wherein the plaintiffs pleaded that they were engaged in an illegal and unlawful enterprise in that the railroad company by contract attempted to delegate a part of their charter powers to a foreign coporation, namely, The Pullman Company, in view of the mandatory provisions of Article 6260, Revised Civil Statutes of Texas, [fol. 577] which requires that only corporations chartered under the laws of the State of Texas may operate railroads in said state, and the damages as alleged by the plaintiffs to sustain jurisdiction were based upon interfering with the rights of the railroad companies and The Pullman Company under such invalid contracts, and
  - (b) The court had no jurisdiction to entertain the plaintiffs' bill which pleaded that some of the plaintiffs resided in the State of Texas and others resided without the State of Texas and it was not alleged with certainty the specific damage, if any, suffered by each of the plaintiffs.
- 2. The court erred in holding that the Railroad Commission of Texas was without authority to promulgate the order complained of in that Article 6473 of Vernon's Annotated Revised Civil Statutes of Texas provides "if any railroad company \* \* shall charge \* \* or receive a greater rate, charge, or compensation than that fixed and established by the Commission \* \* \* such railroad company \* \* shall be deemed guilty of extortion;" and the pleadings and proof showed without contradiction that the defendant railroads by contract with the defendant, The Pullman Company, were charging rates, fares and tolls for the transportation of passengers that had not been fixed or promulgated by the Railroad Commission, and therefore the plaintiffs had no standing in a court of equity and no right to ask for equitable relief.
- 3. The court erred in not sustaining the defendants' motions to dismiss the plaintiffs' bill of complaint because it appeared in said bill that the railroad companies had

delegated to The Pullman Company a part of their charter powers, and in this indirect way the railroad companies were charging fares, tolls and rates for themselves in an amount in excess of the maximum sum allowed by the statutes of the State of Texas, and the railroad companies were doing indirectly what they cannot do directly, and therefore plaintiffs had no standing in a court of equity.

- [fol. 578] 4. The court erred in holding that the order complained of by the Railroad Commission of Texas was made without statutory authority, because the laws of the State of Texas are mandatory in requiring that said Commission make rules and regulations governing railroads, namely, Article 10, Section 2, of the Constitution of Texas, and Articles 6445 and 6474 of the Revised Civil Statutes of Texas, which provisions of the law authorize the Commission to make the order in question.
- 5. The court erred in issuing a permanent injunction against the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, enjoining said parties from carrying into effect the order in question, because in doing so the court substituted its own opinion for that of the Railroad Commission of Texas.
- · 6. The court erred in holding that the Railroad Commission of Texas was without authority to promulgate a rate order, because Article 6448 of the Revised Civil Statutes of Texas imposes a duty upon the Railroad Commission to fix the rates of all railroads, and because Article 6449 of the Revised Civil Statutes of Texas provides that ten days notice of such hearing shall be a sufficient notice, and in this case the order in question recited on its face that notice was issued on August 19, 1939, and hearing held on August 31, 1939, and the order recited that "the Commission thus finds that all parties interested in the subject matter have been duly notified for the time and in the manner provided by law," and said ruling of the court was in conflict with the decisions of the Supreme Court and the other courts of the State of Texas, and the attack on said order in regard to said notice is a collateral attack and a collateral attack cannot be maintained against such an order.
- 7. The court erred in holding that the attempts of the Railroad Commission of Texas to regulate the rates charged

by The Pullman Company were void and that the Commis-[fol. 579] sion had no jurisdiction over The Pullman Company, because Title 71, Chapter 4, Revised Civil Statutes of Texas, and particularly Article 4477 of said statutes, imposes the mandatory duty upon the Railroad Commission to enforce the Public Health Sanitary Code of the State of Texas, and this was an order authorized by said code and the statutes in regard to the enforcement thereof.

- 8, The court erred in holding that the Railroad Commission had no authority to regulate the rates to be charged by The Pullman Company, because all railroads that do business in the State of Texas must be chartered under the laws of the State of Texas, and all such railroads are under the direct supervision of the Railroad Commission, and the railroads cannot delegate their chartered powers to The Pullman Company by contract and thereby escape regulation of the Railroad Commission or create an agency free from regulation by the Railroad Commission.
- 9. The court erred in entering a judgment enjoining the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, from enforcing the order in question, because the Railroad Commission of Texas had. the authority to pass and enforce said order by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority on the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses," and "to prevent abuses in the conduct of their business" (adopted 1911, and now codified as Article 6445 of the Revised Civil Statutes of Texas) and the Legislature has not left it up to the Railroad Commission to define the "abuse," but the Legislature has defined the abuse involved in this case by saying that "unjust discrimination is \* \* \* prohibited and" it shall constitute unjust discrimination "if any railroad \* \* \* shall give any undue \* \* \* preference or advantage to any particular person \* \* or locality, or [fol. 580] subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever" (Article 6474 of the Revised Civil Statutes of Texas); and therefore, the Railroad

Commission of Texas had the authority to adopt said order in question and enforce the same.

- 10. The court erred in making any findings of fact of any kind because it is not for the Federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better, and it is not proper for the court to determine which witnesses should be believed and which ones should be disbelieved, but it is only a question of whether or not there is any evidence on which the Commission's judgment can be founded, and as there was such evidence in this case the Federal Court cannot disturb or interfere with the Commission's judgments or orders.
- 11. The court erred in making the findings of fact set out in paragraph 7 of the court's findings of fact filed in this case, said findings of fact in said paragraph 7 beginning with the words "All of the Pullman porters in Texas" and ending with the words "there is no reasonable basis for finding contrary to the facts stated in this finding No. 7", because said findings of fact so set forth in paragraph 7 of the court's findings are contrary to the evidence and are not supported by the testimony and the evidence in this case.
- 12. The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, and their motions to dismiss, because the plaintiffs in this case had no standing in a court of equity, for the reason that they relied on contracts between the railroad companies in this case and The Pullman Company, and said contracts between said railroad companies and The Pullman Company are monepolistic and violate both the United States and the State laws prohibiting trusts and monopolies and contracts in restraint of trade, and said contracts so relied on and pleaded and urged by the plaintiffs are void and illegal.
- [fol. 581] 13. The court erred in holding (as stated in paragraph 2 of the court's conclusions of law) that the railroads are necessary and proper parties to this action, because such a conclusion is contrary to the evidence and testimony in this case and contrary to law.
- 14. The court erred in holding (as stated in paragraph 6 of the court's conclusions of law) that the challenged orders

in question were not within the powers delegated to the Railroad Commission of Texas because the Railroad Commission has authority by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority upon the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses". and "to prevent \* \* abuses in the conduct of their business' (Adopted 1911, and now codified as Article 6445, Revised Civil Statutes of Texas), and the Legislature has not left it up to the Railroad Commission of Texas to define the "abuse", but the legislature has defined the abuse involved in this case by saying that "unjust discrimination is \* \* \* prohibited" and it shall constitute unjust discrimination "if any railroad \* \* \* shall give any undue preference or advantage to any particular person or locality or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever"; and because of said provision's of the law of Texas, the Railroad Commission has authority to make and enforce such order.

15. The court erred in holding (as stated in paragraph 7 of the court's conclusions of law) that the power to issue the challenged order in question is not derived from Article 6445 of the Revised Civil Statutes of Texas, because said Article 6445 authorizes the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses" and "to prevent .\* \* abuses in the conduct of their business", and the failure of the defendants to comply [fol. 582] with the order in question, that is, operate sleeping cars on lines of railroads in Texas without said care being in the charge of a Pullman conductor, and operate sleeping cars on other lines with Pullman conductors in charge, is an abuse under the facts in this case, and has been defined as an abuse by the Legislature of Texas under Article 6474 of the Revised Civil Statutes of Texas; and therefore the Railroad Commission of Texas had authority to make the · order in question.

16. The court erred in holding (as stated in paragraph 8 of the court's conclusions of law) that no Texas Statute has defined as an abuse, or prohibited, the operation of a sleeping car that is not in charge of a Fullman conductor,

because the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses and the Legislature of Texas has passed said law, to-wit Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

- 17. The court erred in holding (as stated in paragraph 9 of the court's conclusions of law) that the challenged orders are not within the authority delegated to the Railroad Commission of Texas by Article 6474 of the Revised Civil Statutes, because said Article 6474 provides that if any railroad shall give any undue preference or advantage to any particular person or locality it is an unjust discrimination, and under the facts in this case plaintiffs have been, and are now, operating sleeping cars on some lines of railroads without said cars being in charge of Pullman conductors, and at the same time have operated sleeping cars on other lines with said cars being in charge of a Pullman conductor, and the operation of sleeping cars on different lines in different manners in such fashion constitutes a discrimination and an abuse in violation of Article 6474.
- 18. The court erred in holding (as stated in paragraph 11 of the court's conclusions of law) that the Texas Legislature having enacted a full crew law requiring a crew of four men on a train, the Railroad Commission thereby has no authority to pass the order in question requiring Pull-[fol. 583] man conductors to be in charge of all sleeping cars, because said full crew law is a separate act of the Legislature and does not prevent the Railroad Commission of Texas from preventing abuses and discrimination as authorized by Article 10, Section 2, Constitution of Texas, and Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.
- 19. The court erred in denying and overruling the defendant's motion to dismiss and in holding (as stated in paragraph 15 of the court's conclusions of law) that the defendant's motion to dismiss should be denied, because the plaintiffs' complaint failed to state a cause of action in favor of any plaintiff against any defendant upon which relief could be granted, in this, to-wit, the complainant failed to allege that there was insufficient evidence or that there was no evidence before the Railroad Commission of Texas to support or justify the orders in question, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before

said Commission said orders were arbitrary and unreasonable, or that said order or the enforcement thereof constituted unlawful interference with interstate commerce, or that said orders or the enforcement thereof constituted a taking of the plaintiff's property without due process of law.

- 20. The court erred in permanently enjoining the defendants from attempting to enforce the orders in question, becuase the jurisdiction of the United States District Court, where this case was tried, did not rest on diversity of citizonship, and therefore the only question open to said Court was whether or not the state action complained of, to-wit, said Railroad Commission action and order and the enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours " \* the Due Process Clause may place upon the exercise of the State's regulatory power", and therefore the trial court did not [fol. 584] have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes, to adopt and enforce said orders.
- 21. The court erred in holding (as stated in the court's opinion and in its conclusions of law, and particularly in paragraph 6 of the Court's conclusions of law) that the orders in question are not within the powers delegated to the Railroad Commission, because the jurisdiction of the United States District Court, where this case was tried, did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the state action complained of, to-wit (said Railroad Commission action and order and enforcement thereof, transgressed the .Constitution of the United States and whatever "vague contours \* \* \* the Due Process Clause may place upon the exercise of the State's regulatory power", and therefore, the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes to adopt and enforce said orders.

Appellants hereby designate the following parts of the record which they think necessary to be printed for the

consideration of the foregoing points upon which appellants intend to rely:

1. Plaintiffs' First Amended Complaint.

2. Temporary restraining order, dated November 28, 1939.

3. Bond for Temporary Restraining Order (omitting

Power of Attorney).

4. Order constituting and assembling Three-Judge Court,

dated January 12, 1940.

- 5. Writ to serve copies of complaint, etc., on W. Lee O'Daniel, Governor, dated January 13, 1940, and Marshal's return thereon.
  - 6. Defendants' First Amended Motion (to dismiss).

7. Defendants' Original Answer.

8. Order of court allowing Warren J. West, et al., to intervene as plaintiffs.

[fol. 585] 9. Complaint of intervener plaintiffs.

- 10. Motion of M. B. Cunningham, et al, to be permitted to intervene as defendants.
  - 11. Pleadings of interveners M. B. Cunningham, et al.
- 12. The reporter's transcript of the evidence certified to by H. P. Bickler and Roy J. McLean, court reporters.

13. Opinion of the court, after trial on the merits, filed

April 3, 1940.

14. Final judgment, dated April 23, 1940.

- 15. Findings of fact and conclusions of law, dated June 11, 1940.
- 16. Petition for appeal, filed and dated June 18, 1940,—Exhibits to be omitted.
- 17. Statement of jurisdiction as required by Supreme Court Rule 12 (including attached exhibits).
  - .18. Assignments of error.
  - 19. Order allowing appeal, dated June 18, 1940.
- 20. Notice of appeal, with date of filing, and acknowledgment of service thereof,—Exhibits to be omitted.
  - 21. Citation on appeal, and acknowledgment of service thereof.
  - 22. Appeal bond, and approval thereof, dated June 18, 1940.
    - 23. Stipulation of the parties as to the record on appeal.
- 24. This Statement of Points on which Appellants intend to rely and of parts of the record which Appellants

think necessary for the consideration thereof, and acknowledgment of service thereof.

- Gerald C. Mann, Attorney General of Texas; Glenn R. Lewis, Lee Shoptaw, and Cecil C. Rotsch, all of Austin, Texas, Attorneys for The Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest O. Thompson, and Gerald C. Mann, Attorney General of Texas. By Cecil C. Rotsch.
- A. B. Culbertson and Cecil A. Morgan, of Fort Worth, Texas, Attorneys for intervening defendants M. B. Cunningham, W. M. Hadley and W. A. Wofley. By Cecil A. Morgan.

#### [fol. 586] ACKNOWLEDGMENT OF SERVICE

Service of the foregoing statement of the points on which appellants intended to rely and designation of the parts of the record to be printed is acknowledged by the undersigned attorneys for appellees this 24th day of July, 1940.

Ireland Graves, Attorney for the Appellee, The Pullman Company, and for the Appellees, Warren J. West, et al.

Claude Pollard, Attorney for all of the other Appellees.

[fol. 586½] [File endorsement omitted.]

#### [fol. 587] IN SUPREME COURT OF THE UNITED STATES

Designation by Appellers of Additional Parts of the Record for Printing—Filed August 1, 1940

Pursuant to paragraph 9 of Rule 13 of the rules of the Supreme Court, the appellees hereby designate the additional parts of the record which they think material:

1. Order of the Presiding Judge directing the transmittal to the Supreme Court of certain original papers and exhibits.

2. This designation of additional parts of the record for printing.

Lowell M. Greenlaw, Chicago, Illinois; Herbert S. Anderson, Chicago, Illinois; Charles L. Black, Austin, Texas; John W. Stayton, Austin, Texas; Ireland Graves, Austin, Texas. Attorneys for the appellee The Pullman Company and for the intervener plaintiff appellees Warren J. West, et al. By Ireland Graves, Austin, Texas. Claude Pollard, Austin, Texas, Attorney for other appellees.

[fol. 588] Service of the foregoing designation by the appellees of additional parts of the record to be printed is acknowledged by the undersigned attorneys for appellants, this 31 day of July, 1940.

Cecil C. Rotsch, Attorney for appellants the Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest O. Thompson, and Gerald C. Mann, Attorney General of Texas.

Cecil A. Morgan, Attorney for intervening defendants M. B. Cunningham, W. M. Hadley and W. A. Worley.

[fol. 589] [File endorsement omitted]

Endorsed on cover: File No. 44,632 W. Texas, D. C. U. S., term No. 283. Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, et al., Appellants, vs. The Pullman Company, Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, et al., Filed July 26, 1940. Term No. 283 O. T. 1940.

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CHARLES ELMORE CROPLEY

OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL.,

Appellants,

vs.

THE PULLMAN COMPANY, GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BRU VNSVILLE AND MEXICO BAILWAY COMPANY, DEBTOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION.

GERALA C. MANN,

Attorney General of Texas,
CECIL C. ROTSCH,
GLENN R. LEWIS,
LEE SHOPTAW,
A. B. CULBERTSON,
CECIL A. MORGAN,

Counsel for Appellants;

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### IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

#### Civil Action No. 38

THE PULLMAN COMPANY, ET AL.,

Plaintiffs,

vs.

THE RAILROAD COMMISSION OF TEXAS, ET AL., Defendants.

#### STATEMENT OF JURISDICTION AS REQUIRED BY SUPREME COURT RULE 12.

Your petitioners respectfully submit that the Supreme Court of the United States has jurisdiction on appeal to review the judgment in question in that Section 380, Title 28, Chapter 10, United States Code (Judicial Code, Section 266, Amended) provides:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by any administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme

Court, or by the district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge \* \* \* An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case \* \* \* The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district. court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In connection with the above statute your petitioners further show that an interlocutory injunction was issued in this case on the 28th day of November, 1939; that a 3-Judge Court was assembled, consisting of a Circuit Judge and two District Judges; that the case was heard before the three judges on its merits on the 17th day of February 1940, and that a final decree granting a permanent injunction in said suit was entered on the 23 day of April 1940.

The validity of the statutes of the State of Texas are involved, particularly Article 6445, which reads:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to

adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

#### Article 6448 reads:

- "1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.
  - "9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto."

#### Article 6473 reads:

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred nor more than five thousand dollars."

Article 6474 reads:

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever."

The date of the final judgment sought to be reviewed is April 23, 1940. The day upon which the application for appeal is presented is 18 day of June, 1940. There is attached hereto a copy of the interlocutory order marked Exhibit "A", together with a copy of the final judgment marked Exhibit "B", together with a copy of the court's opinion marked Exhibit "C", all of which are incorporated herein by reference.

The Railroad Commission is the administrative department of the State Government of Texas and duly organized pursuant to Chapter 11, Title 112, Article 6444 to Article 6494 Vernon's Annotated Statutes of Texas. The Railroad Commission of Texas promulgated an order on November 4, 1939 regarding the operation by the railroad companies of sleeping cars, making certain findings that the manner in which the said railroad companies were now operating their sleeping cars was an abuse and an unjust discrimination as

to the passengers and making certain requirements of such companies. The railroad companies, together with The Pullman Company, have joined together as plaintiffs and challenged said order of the Railroad Commission on many grounds and asked for an injunction restraining the enforcement of such order.

The 3-Judge court entered its final decree or final judgment herein on the 23 day of April, 1940, and permanently enjoined the Railroad Commission of Texas, its members, officers and agents, as well as the Attorney General of Texas, from enforcing said order, which order related to the safety, care, comfort, convenience, proper accommodation, charges, fares and transportation of passengers on sleeping cars and Pullman cars within the State of Texas, and to prevent abuses, unjust discrimination and extortion in rates. The petitioners herein (defendants in the trial of this case) contend that said order was valid, just and reasonable and that the 3-Judge court abused its discretion in issuing a permanent injunction against the same in that the court substituted its own opinion for that of the findings and order of the Railroad Commission. The court's investigation and its conclusions were not limited to the constitutional questions involved, but the court invaded the province of the Commission, usurped its authority and substituted its own opinion and findings for that of an administrative body of the State.

See:

Chicago, R. I. & P. R. Co. v. Arkansas, 55 U. S. Sup. Ct. Reps.;

Atlantic, etc. v. State of Georgia, 234 U. S. 280, 58 L. Ed. 1313;

G. C. & S. F. Ry Co. v. Texas, 169 S. W. R. 385, affirmed by the Supreme Court, 62-L. Ed. 574; 246 U. S. 58; South Carolina, etc. v. Barnwell Bros., Inc., 82 L. Ed.

734.

WHEREFORE, we respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

GERALD C. MANN,
Attorney General of Texas;
CECIL C. ROTSCH,
GLENN R. LEWIS, and
LEE SHOPTAW,

Attorneys for The Railroad Commission of Texas, Lon A. Smith, Jerry Sadler and Ernest O. Thompson, and Gerald C. Mann, Attorney General of Texas,

By CECIL C. ROTSCH;
A. B. CULBERTSON,
CECIL A. MORGAN,

Attorneys for Intervening Defendants M. B. Cunningham, W. M. Hadley and W. A. Worley,

By CECIL A. MORGAN.

#### EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 38.

THE PULLMAN COMPANY et al., Plaintiffs,

VS.

THE RAILROAD COMMISSION OF TEXAS et al., Defendants.

Hearing of the application of the plaintiffs in the above cause for temporary restraining order having been set for this date, came the plaintiffs by their attorneys, and pursuant to due notice came also the defendants by their attorney, the Attorney General of the State of Texas; and the parties announced ready for said hearing, and after hearing and considering the verified amended complaint, and the argument of counsel; and it appearing that in the complaint the plaintiffs challenge the validity of certain orders of the Railroad Commission of Texas on Federal constitutional grounds and that substantial Federal questions are presented in the complaint and that this Court has jurisdiction of the parties and the subject-matter; and it having been made clearly to appear from specific facts shown by the verified complaint that, unless a temporary restraining order is granted, plaintiffs will suffer immediate and irrepagable injury, loss and damage, in that the order of the Railroad Commission dated August 8, 1939 (Exhibit A in the complaint) and the order of the Railroad Commission dated November 4, 1939 (Exhibit F in complaint), impose heavy burdens upon the plaintiffs beginning December 1, 1939; and the plaintiffs are entitled by the laws of the State of Texas to have said orders reviewed in a court of competent jurisdiction in Travis County, Texas, and that there is no provision in the State law or in the challenged orders suspending their enforcement pending such review; and that, in the absence of a temporary restraining order or

injunction, plaintiffs will be subjected to prosecution for heavy, daily recurring, penalties for failing and refusing to obey said orders on and after December 1, 1939;

Wherefore, it is ordered that upon the filing by the plaintiffs of a good and sufficient bond in the sum of \$10,000.00 to be approved by the clerk of this Court, payable to the defendants named in the complaint, and conditioned that plaintiffs will answer for all damages and costs which the defendants may sustain in consequence of the issuance of this temporary restraining order, or of any extensions thereof, the clerk of the United States District Court for the Western District of Texas issue a temporary restraining order enjoining and restraining the defendants Railroad Commission of Texas and the members thereof and the Attorney General of the State of Texas, their respective representatives, agents, servants and employees, from · attempting to enforce against the plaintiffs, or any of them, the aforesaid orders of the Railroad Commission of Texas (Exhibits A and F attached to the complaint), and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or otherwise, for violation of said orders, or any part thereof. further ordered only until the hearing and determination of the application for interlocutory injunction upon notice. And it is further ordered that a statutory three judge courtbe convened at ---, Texas, on the -- day of ---, 19-, at -. M., for the purpose of hearing plaintiffs' application for interlocutory injunction; and that the defendants and the Governor of Texas be given notice of said hearing. as required by Section 380, Title 28, United States Code, and the clerk is directed to issue for service on said interested parties copies of this order.

Done at Waco, Texas, this the 28th day of November, A. D. 1939.

CHARLES A. BOYNTON, United States District Judge.

#### EXHIBIT "B".

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

#### Civil Action No. 38.

THE PULLMAN COMPANY et al., Plaintiffs,

vs.

THE RAILROAD COMMISSION OF TEXAS et al., Defendants.

#### Judgment.

This action came on to be heard on February 17, 1940, at this term on the plaintiffs' motion for preliminary injunction, and at the same time on final trial on the merits, before a statutory court of three judges consisting of Sibley, Circuit Judge, and McMillan and Allred, District Judges; and, upon conclusion of the evidence, was argued by counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz:

- 1. That the defendants' motions to dismiss the action be and are hereby overruled.
- 2. That the defendants, the Railroad Commission of Texas and Lon A. Smith, Ernest O. Thompson and Jerry Sadler, members of said commission, and Gerald C. Mann, Attorney General of the State of Texas, their respectives successors, agents, representatives and employees, be and they are, each and all, hereby permanently enjoined from attempting to enforce against the plaintiffs, or any of them; the order of the Railroad Commission of Texas dated November 4, 1939 (Railroad Commission Docket No. 3669-R. an "Order amending passenger circular No. 164, issued by the Railroad Commission of Texas on the 8th day of August, 1939") and the order of the Railroad Commission of Texas dated the 8th day of August, 1989, known as Passenger Circular 164, copies of which are attached to the Amended Complaint as Exhibit F and Exhibit A, respectively; and from instituting or prosecuting any suit or suits against the plaintiffs, or any of them, for penalties, or

otherwise, for the violation of said orders, or any part thereof; and from taking any steps whatsoever looking to the enforcement of said orders, and from seeking in any way to penalize plaintiffs, or any of them, for violating or not obeying said orders, or any part thereof.

3. All costs incurred by the intervening defendants, or occasioned by their intervention, are taxed against said intervening defendants, M. B. Cunningham, W. A. Worley and W. M. Hadley. All other costs are taxed against the defendant the Railroad Commission of Texas.

To all of which judgment the defendants, including the intervening defendants, duly excepted.

Done this 23 day of April, 1940.

Samuel H. Sibley,

Circuit Judge;

Robert J. McMillan,

District Judge;

James V. Allred.

District Judge.

Approved as to form: CECH C. ROTSCH. CECIL A. MORGAN.

#### EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 38.

THE PULLMAN COMPANY et al., Plaintiffs,

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THE RAILROAD COMMISSION OF TEXAS et al., Defendants.

Before Sibley, Circuit Judge, and McMillan and Allred, District Judges.

Per CURIAM:

The Pullman Company and a large number of Railway Companies operating in Texas and Trustees in charge of

Railways operating in Texas bring this suit against the Railroad Commission of Texas, the various members thereof and the Attorney General, to restrain the enforcement of a certain order made by the Commission on the 4th day of November, 1939.

The order purports to be made pursuant to the statutes of the State of Texas and a sum in excess of the jurisdictional amount is shown to be involved. The ground of attack is the unconstitutionality of the order. A temporary restraining order was applied for and granted. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

Upon the trial, without objection on the part of anyone, leave was granted to three Pullman porters and to three Pullman conductors to intervene. The Pullman porters made common cause with the plaintiffs and the Pullman conductors aligned themselves with the defendants.

The order complained of is long and contains some twenty-nine very extensive findings of fact. These are followed by certain recitals labeled as orders and certain decrees with regard to rates which may be charged under certain circumstances by the Railroads and the Pullman Company. However, the gist of the order and the provision which is particularly assailed and which it is manifest it was the prime purpose of the order to put into effect, is as follows:

"It is further ordered, adjudged and decreed that no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor."

Plaintiffs make their attack upon a great many grounds. It is unnecessary to mention more than two or three of them. It is first asserted that the order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas. It is said, second,

that in so far as it purports to relate to transportation rates, it is void for the reason that it was issued without notice of a heaving for such purpose. It is further contended that the order is unjust, arbitrary, unsupported by any basis in fact and, accordingly, confiscatory. Defendants joined issue with plaintiffs upon these matters and evidence was introduced at great length by both sides.

It appears without contradiction that there are some sixteen or seventeen routes in Texas where the Pullman cars, so far as the Pullman Company is concerned, are in charge of a porter. In most cases, this occurs only where the distance traversed is short, and it is invariably true that it occurs only in instances where there is only one Pullman car on the train. The general control of the Pullman car and the passengers therein is lodged in the Bailroad conductor. On trains where two or more Pullman cars are being carried contemporaneously, a Pullman conductor is in charge, subject, however, to the train conductor.

We are confronted at the outset by the question as to what authority the Railroad Commission has to make the challenged order. The Railroad Commission is a creature of statute. It gets no authority by implication or from the common law. It is given the authority by statute to correct abuses, but the Texas courts have been uniform in holding that the abuse must be one defined by law. In Railroad Commission v. H. & T. C. Ry. Co., 90 Texas, at Page 352, the Supreme Court says:

"The question then arises, What abuses can the Railroad Commission correct? We think that it must be some abuse which has been defined by the law, and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation."

In State v. Suggitand Ry. Co., 163 S. W. 1047 (writ refused), the Court said:

"The Commission is a creature of the statute, based upon constitutional provision for the establishment of an agency in this state, with such powers as may be deemed adequate and advisable. Section 2, Art. 10, Const. of Texas. Being a creature of statute, with such powers only as the Legislature deemed adequate and advisable, it could deraign no authority by implication or from the common law. See Railroad Commission v. G., H. & S. A. Ry. Co., 51 Tex. Civ. App. 447, 112 S. W. 353. An order of the Commission, to be valid, must be based upon some express provision or delegation of power made by statute. R. R. Com. v. G., H. & S. A. Ry., supra; I. & G. N. R. R. Co. v. R. R. Com., 99 Tex. 332, 89 S. W. 961. We think that, before the appellee could claim the protection of such order, it must be able to put its finger upon the statute conforring upon the Commission the authority to make the same, which has not been done."

See also State v. St. L. S. W. Ry. Co., 165 S. W. 491.

There is no Texas statute which, forbids the operation of a train carrying a Pullman car without a Pullman conductor, nor is'there any statute that defines such action as an abuse. The Legislature has fixed the necessary members of a train crew and a Pullman conductor is not included. Article 6380, Vernon's Annotated Texas Statutes, 1925. Defendants do not deny the correctness of the law as set out in the decisions quoted from. In fact they state, upon page 13 of their brief, that they concur in those views. Being called upon to put their finger upon the statute" which authorizes the making of an order of this kind, they. point to Article 6474. That Article does not denounce the transportation of a Pullman car without a Pullman conductor as an abuse, but relates to the matter of unjust discrimination and defines certain things which shall, under its terms, constitute unjust discrimination. It is summarized by defendants in their brief as follows:

"A duty is imposed on the railroads not to give any undue or unreasonable preference to any person or locality or subject any traffic to any disadvantage whatsoever, and a penalty is prescribed for failing to observe such duty."

We are not of the opinion that the order is sustained by the provisions of this statute. It will be noted that the statute denounces unjust discrimination. The Supreme Court of Texas, in constrning Section 2 of Article 10 of the Constitution, upon which the statute is based, said, in St. Louis Southwestern Railway Co. v. State of Texas, 113 Tex. at page 579:

"But, whatever meaning should be ascribed to the word unjust, two things seem perfectly plain in construing Section 2 of Article X, of the Constitution, to-wit: first, that all discrimination in passenger fares was not forbidden, but only such as would operate unjustly."

It is certainly not an unjust discrimination to adapt the service to different conditions of traffic. Every train is not required to be the duplicate of every other train in order to awoid unjust discrimination. The record in the case fails to support the contention that there is any unjust discrimination as against the public generally by reason of the fact that on certain trains where only one Pullman car is being handled, the operation, so far as the Pullman Company is concerned, is in charge of a porter, who is subject to the direction and control of the train conductor. However, without regard to these matters, the order cannot be upheld as a correction of an unjust discrimination, because it is not within the Legislative definition of that term and the Commission is without power to make one of its own.

As we have heretofore noted, it cannot stand as a correction of an abuse, because the so-called abuse has not been defined or prohibited by law.

The regulation cannot be sustained as a rate order for the reasons, first, it was not made after notice given as required by law, and second, it is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and the Pullman Company, which it is without any statutory authority to do. Furthermore, in so far as it attempts to regulate the rates charged by the Pullman Company, it is void, as the Commission has no jurisdiction over the Pullman Company.

The intervenors Pullman conductors have raised on their own account certain jurisdictional questions, predicated upon the assertion and assumption in some instances, that plaintiffs are operating their railroads in Texas in violation of the law. If it be conceded that, as intervenors, they have the right to question the propriety of the main proceeding in this fashion, we are still of the opinion that their contention is without merit and should be overruled.

The views which have been expressed make it unnecessary to rule on the question as to whether the order is arbitrary. The Commission being without statutory authority to make an order of this character, the question as to its reasonableness is immaterial.

It accordingly follows from what has been said that a decree should be entered for the plaintiffs, and its terms may be settled after notice.

Samuel H. Sibley,

Circuit, Judge;

James V. Allred,

District Judge;

Robert J. McMillan,

District Judge.

(CA No. 38, The Pullman Company et al. v. The Railroad Commission of Texas et al.; page 6, Opinion of the Court.)

Endorsed: Civil Action No. 38. In the District Court of the United States for the Western District of Texas, Austin Division, The Pullman Company, et al., Plaintiffs v. Railroad Commission of Texas, et al., Defendants Statement of Jurisdiction as Required by Supreme Court Rule 12. Filed: 18th Day of June, 1940. Maxey Hart, Clerk, by Joe Steiner, Deputy.

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In the

#### Supreme Court of the United States

October Term, 1940

NO. 283

RAILROAD COMMISSION OF TEXAS, ET AL, Appellants

THE PULLMAN COMPANY, ET AL, Appellees

BRIEF FOR APPELLANTS,
Railroad Commission of Texas, Lon A. Smith,
Ernest O. Thompson, Jerry Sadler,
and Gerald C. Mann

Appeal from the District Court of the United States for the Western District of Texas

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## Supreme Court of the United States

October Term, 1940

NO. 283

RAILROAD COMMISSION OF TEXAS, ET AL,
Appellants

THE PULLMAN COMPANY, ET AL,

Appellees

#### BRIEF FOR APPELLANTS,

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, Jerry Sadler, and Gerald C. Mann

## "OPINION BELOW

The opinion of the statutory three-judge court, dated April 3, 1940, (R. 359) is reported in 33 Fed. Supp. 675.

# STATEMENT OF GROUNDS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Sections 238 and 266 of the Judicial Code, as amended by the act of February 13, 1925 (United States Code, Title 28, Sections 345 and 380). The judgment appealed from in this case was dated and filed April 23, 1940. (R. 364) This appeal was allowed by an order of the District Court entered on June 18, 1940. (R. 384) The record was filed in this court on July 26, 1940; and the order noting probable jurisdiction was entered on October 14, 1940.

## STATEMENT OF THE CASE

(A) PLAINTIFFS' COMPLAINT AND NATURE OF THE SUIT

This suit was brought in the District Court of the United States for the Western District of Texas by The Pullman Company and twelve railroads as plaintiffs, against the Railroad Commission of Texas, the three members thereof, and the Attorney General of Texas, as defendants, asking the court to restrain by injunction the enforcement of an order of the Railroad Commission of Texas whereby it was required that all sleeping cars be in the charge and care of a pullman conductor.

The pleadings and evidence showed that on August 8, 1939, the Railroad Commission of Texas en-

tered an order on its own motion relating to the operation of sleeping cars, and thereupon the Pullman Company requested a hearing, and notices were issued as provided by the rules of the Commission for the time and in the manner provided by law; and appearances were made by the Pullman Company, the various railroads, and the Order of Sleeping Car Conductors, each represented by their attorneys and a hearing held beginning August 31, 1940. (R. 9, 37 and 65) Upon the conclusion of said hearing an order, dated November 4, 1939, was entered by the Commission, which provided in part as follows:

"The Commission thus finds that all of the parties interested in the subject matter have been duly notified for the time and in the manner provided by law and that all of said parties entered an appearance in this cause and, with all parties having announced ready, the Commission proceeded to hear the oral testimony of seventeen witnesses, some of whom were offered by the railroad companies, the Pullman companies and the other parties at interest, as well as documentary evidence, and after a full, final and complete hearing of evidence, which lasted for two days and after argument of counsel, the Commission being fully advised in the premises, FINDS:

"(1) The Pullman Company has made arrangements with the railroads of Texas by the terms of which it is obligated to furnish standard sleeping and parlor cars, properly equipped and acceptable to the railroad company, sufficient to meet the requirements of travel over

the lines of railroads operated by said companies in Texas and under such contract it has the exclusive right to operate pullman cars and sleepers over the railways in Texas, except that the railroads should have the right to operate their own parlor cars, either exclusively or in addition to the parlor cars furnished by the Pullman Company.

- "(2) The contracts between the Pullman Company and the railroads provide that the Pullman Company shall have the right to collect from the occupants of its cars for the use of seats, berths and rooms therein such fares as shall be charged on competing lines of railroads:
- "(3) While the various contracts differ as to the compensation the railroads are to receive from the Pullman Company for this exclusive right to furnish such cars and services, they all provide in substance that all receipts from operations above a given sum per car per annum shall be divided between the railway company and the Pullman Company in various graduated proportions. The railroad companies are thus directly interested in charges made by the Pullman Company for the use of its seats and services to the extent of sharing in the profits over and above a given amount per car per annum and this indirectly amounts to a tariff charge or additional compensation to the railroads for the privilege of riding in cars and obtaining services rendered by the Pullman Company under such contracts. All of this is in addition to the extra fare required to be paid by a passenger before he can have the privilege of purchasing a seat in and

- "(7) The railroads of Texas are charging the maximum sum allowed by the Statutes of this state for passengers who desire to ride in sleeping cars or pullman cars, namely, 3c per mile. This charge is made and collected by the railroad companies. In addition thereto, sleeping car companies or the Pullman Company collects an extra fare for the privilege of riding in pullman cars. \* \* \*
- The Commission finds from the evidence that there are seventeen separate and distinct operations on the various railroads in Texas without pullman conductors in charge of pullman cars. The Commission further finds that all other runs other than the seventeen operations disclosed by the evidence, do have a pullman conductor in charg e of the pullman cars: that the failure to have pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pullman conductors; that in every instance the same rates and fares are exacted by the railroad companies and the Pullman Company and in one instance the services of a Pullman concudtor are offered and in the other instances enumerated, namely, the seventeen operations, such services are not rendered. (Italics ours).
  - " \* \* \* the failure on the part of the railroad

companies and that of the Pullman companies to thus provide such service and protection to such passengers is an abuse, a disadvantage and an undue and unjust discrimination against all passengers who ride on any one or more of said seventeen operations where Fullman conductors are not used. (Italics ours).

"(13) Pullman conductors are especially trained by the Pullman Company to render a special type service to passengers riding in the Pullman cars. \* \* \*

"(25) That it is impossible for the train conductor to perform all the duties required of him in the operation of the train and likewise perform the additional duties of a Pullman conductor. \* \* \* (Italics ours).

"IT IS, THEREFORE, ORDERED, AD-JUDGED AND DECREED that it is necessary in order to correct the abuses aforesaid and eliminate the existing unreasonable and undue disadvantage, prejudice and discrimination to such described traffic that the services, safety, convenience and comfort for which such extra fare is paid and as contracted between the railroads and the Pullman Company be provided, and that failure to provide it is to the unreasonable and undue disadvantage and prejudice to and a discrimination against the said pas-

sengers as described, and would be charging a fare for which contracted services are not performed.

"IT IS FURTHER ORDERED, ADJUDG-ED AND DECREED that no sleeping car shall be operated on any line of railroad in the State of Texas \* \* \* unless such cars are continuously in the charge of an employee \* \* \* of \* \* \* the rank and position of Pullman conductor.

"IT IS FURTHER ORDERED by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force.

"It is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce.

## "\*\*\*." (R. 37)

The complaint of the Pullman Company and the twelve railroads, as plaintiffs, alleged that the Pullman Company is a private corporation organized under the laws of the State of Illinois, that eight of the plaintiff railroads are incorporated under the laws of the State of Texas, and that the other plaintiff railroads and trustees operating them are corporations and/or residents of other jurisdictions. (R. 1)

The pleadings and evidence showed that the Pullman Company is engaged in the sleeping car business in that it owns sleeping cars (known as Pullman cars), that each of the other plaintiffs, separate from each other, operate railroads and train service thereon; and that the Pullman Company had entered into a contract with each of the other plaintiffs whereby it furnishes sleeping cars with crew (conductors and porters) and equipment for use in the trains operated on the railroad lines of each of the other plaintiffs. (R. 6, 65) All of said contracts provide that the Pullman Company shall have the right to collect from the occupants of its cars for the use of the seats and berths and other accommodations therein such fares as are charged on lines of railroads competing with the lines of the contracting railroad companies where similar accommodations are furnished; and the Pullman Company shall provide suitable employees for collecting such fares and furnish the usual sleeping car service to the passengers therein. (R. 6, 65)

It appeared from the pleadings and evidence that the only connection between any of the plaintiffs is that the Pullman Company furnishes the sleeping cars, with a crew (conductors and porters), to each of the other plaintiffs for use on their railroad lines. These other plaintiffs each operate their railroads and their trains separate from each other. (R. 6)

The pleadings and the evidence showed that the railroads and trains operated by some of the plaintiffs are entirely within the State of Texas and are therefore *intrastate* operations, but that in the case of some of the other plaintiffs they operate *interstate* trains between Texas and other states. In other words, only a part of the plaintiffs operate interstate trains. (R. 17 to 20, and 68)

The plaintiffs' complaint prayed that a temporary injunction be granted, and that on final hearing that the same be made permanent, enjoining the defendants from enforcing said order of the Railroad Commission of Texas; and the principal grounds on which it asked for such injunction were (1) that "the order is not within the authority delegated to the Railroad Commission by any statute or law of the State of Texas," (2) that "it is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it will deprive the plaintiffs of their property without due process of law," and (3) that "said order as applied to the plaintiffs \* \* \* constitutes an \* \* \* interference with interstate commerce in violation of the com-

merce clause of the Constitution of the United States." (R. 30)

(B) TEMPORARY RESTRAINING ORDER GRANT-ED

A temporary restraining order was granted by a District Judge of the United States District Court for the Western District of Texas on November 28, 1939. (R. 56)

### (C) THREE-JUDGE COURT ORGANIZED

After the temporary restraining order was granted, a three-judge court was organized under Section 266 of the Judicial Code (United States Code, Title 28, Section 380); and said court tried the case on the merits. (R. 58)

#### (D) OTHER PARTIES INTERVENE

Prior to the trial, leave was granted to three Pullman porters to intervene as plaintiffs and to three Pullman conductors to intervene as defendants, and they participated in the trial in said capacities. (R. 73 to 77)

#### (E) DEFENDANTS' ANSWER

The defendants filed and urged a motion to dismiss in which it was contended, among other things, (1) that the complaint failed to state a cause of action in favor of any plaintiff against any defendant

upon which relief could be granted (Par. 1, Motion to Dismiss), (2) that there was a misjoinder of plaintiffs because the complaint alleged that when the order was enforced against some of the plaintiffs it constituted an interference with interstate commerce but as to other plaintiffs it did not constitute such an interference (Par. 2, Motion to Dismiss), (3) that there was a misjoinder of plaintiffs and causes of action because the causes of action alleged by the various plaintiffs were separate from each other (Par. 3, 4 and 6, Motion to Dismiss), (4) that the Pullman Company had no cause of action because it did not have sufficient interest (Par. 5, Motion to Dismiss), (5) that no cause of action was stated because the complaint did not allege that there was "insufficient evidence or no evidence before said Commission to support or justify said order, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable," (Par. 7, 10, 11, Motion to Dismiss), and (6) that it was improper to allege the total property rights that would be destroyed exceeded \$3,000,00 because "each of the plaintiffs has an independent action, the value to all of the plaintiffs jointly could not be considered as determining the jurisdictional question." (Par. 15, Motion to Dismiss.) (R. 60)

The defendants also filed an answer, subject to its motion to dismiss, admitting that said order had been passed by the Commission, but denied the allegations in the plaintiffs' complaint by which it was sought to invalidate the order, and denied that the enforcement of said order interfered with interstate commerce or took property without due process of law, and the defendants also pleaded specially that "the Railroad Commission had before it ample and sufficient evidence sustaining the facts therein (in the order) found," and that said order and the enforcement thereof did not contravene the Federal Constitution, and that the Commission was acting within the authority of the Constitution and statutes of the State of Texas. (R. 65)

#### (F) EVIDENCE ON CONTRACTS AND REASON-ABLENESS OF ORDER

During the trial a large amount of evidence, both oral and documentary, was introduced by both sides. The plaintiffs offered proof to substantiate their allegations with reference to the contracts that exist between the Pullman Company and the various railroads and proved that the fares charged to ride in the sleeping (Pullman) cars is one cent per mile in addition to the three cents per mile per day coach fare charged all passengers by the railroad company, and in addition to said one cent, plus said three cents (total 4c) charge, there is also a charge made for the seat or berth in the Pullman car. (R. 79 to 359)

There was a large amount of testimony on the question of whether or not as far as the safety and welfare of the passengers is concerned, a Pullman

conductor in addition to a train conductor is needed on the trains having sleeping cars.

The witness M. B. Cunningham, who had been a sleeping car conductor in the employ of the Pullman Company for thirty-five years, testified that as part of his duties a Pullman conductor is responsible for the operation of the Pullman cars in general, that he looks after the air-conditioning (R. 269, 270, 293), cleanliness and condition of the porters (R. 269, 272) sanitation of the cars and compliance with the State Sanitary Code (R. 269, 270, 277), that sometimes old people and children are placed in his care (R. 269), that it was his duty to render first-aid and take care of the passengers in case of a wreck and that all Pullman conductors had been given special training in that respect and he said he had been in several wrecks (R. 278), he testified to particular instances showing that the porters employed by the Puliman Company cannot handle the passengers and that particularly during convention crowds and extra heavy business some passengers abuse the porters and consequently the porters cannot properly control the passengers without the aid of a Pullman conductor (R. 273), he stated that one of the problems he had to deal with was that of men and women misconducting themselves together and he cited several instances of immoral conduct (R. 273, 274, 275, 276), and according to his testimony the use of intoxicating liquor is on the increase and both men and women passengers become intoxicated quite often and he

indicated that a porter could not properly handle such a person, particularly if it was a woman (R. 280, 281), and he testified that the train conductor only comes through the sleeping cars once on some trips and that sometimes when they are busy "they can't possibly come back through" the sleeping cars on the entire trip (R. 291); and he said that the porters make up the berths and have charge of the linen (R. 270, 271).

The witness W. M. Hadley, who had been a conductor for the Pullman Company for fifteen years, testified that one of his duties was to keep decorum in the Pullman cars (R. 296 307), that durnig his experience as a sleeping car conductor he had many cases of parents placing their children in his care on the Pullman cars for a trip without the parents and he told of some such instances (R. 297), he said that aged and infirm people were placed in his care as Pullman conductor and he told of an occasion when an old blind lady was placed in his custody and her condition was such that he had to help her to the rest room (R. 297, 309), he also testified that he had had a number of cases of men and women attempting to become unduly intimate with each other and he described specific instances and stated that he always had stopped such conduct (R. 298, 308), he too testified that the drinking of intoxicating liquor was very prevalent and that he had had to take care of drunk people, including a man with delirium tremens and a woman who became so intoxicated she became almost helpless (R. 300, 305, 306), he testified that one of his tasks was the supervision of the cleanliness of the cars and that some porters were negligent in that respect and in some instances they did not keep the floors clean of beer bottles and cigarette stubs unless directed by the Pullman conductors (R. 300, 301), he explained that porters had difficulty in controlling the ventilation and the heating and cooling systems of the sleeping cars and that the Pullman conductors usually attended those things. (R. 303)

The witness C. E. Lowery, who had been an emplovee of the M. K. & T. Railroad Company continuously since the year 1892 and who had served as a train conductor the past twenty-three years, testified to specific instances of the misconduct between men and women passengers and to other misconduct, including student pranks, on the Pullman cars (R. 326, 327, 329), and his testimony shows. that porters alone cannot control or properly handle passengers on trains in Texas and he stated that people in general do not have the respect for Pullman porters that they do for the train conductors and the Pullman conductors (R. 326, 327), and he testified positively that "it would be much better" for a Pullman conductor to be in charge of the Pullman cars, "that the situation would be better taken care of," and that the safety of the passengers and the train would be better taken care of in his opinion if a Pullman conductor was in charge of the sleeping cars (R. 330); and it was his testimony that sometimes when he was acting as train conductor he was so busy with his other duties that

he could not go back to the sleeping cars more than once during his regular 109 mile run and that he left the care of the sleeping cars to the Pullman employees. (R. 328, 329)

Many other witnesses testified in support of the defendants' contention that a Pullman conductor contributed to the safety and comfort of the passengers. Among these witnesses was W. L. Beamer, who had served as a train conductor most of the time since 1907 (R. 316 to 323), and Mrs. H. B. Shank, a mother of two children, who testified that she was so fearful of Pullman porters that she would not ride in a Pullman car if it had no Pullman conductor and had only a porter in charge (R. 335).

## (G) TRIAL COURT'S JUDGMENT.

After hearing the evidence the court took the case under advisement, and on April 23, 1940, entered judgment overruling the defendant's motion to dismiss and permanently enjoining the defendants from enforcing said orders of the Railroad Commission of Texas or from penalizing the plaintiffs for violating said orders. (R. 364)

All of the defendants, including the intervening defendants, excepted to the judgment of the court. This appeal is from said judgment.

## SPECIFICATION OF ERRORS TO BE URGED

1.

The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, their motion to dismiss and their motions relating to misjoinder of causes of action, misjoinder of parties plaintiff, and an unlawful delegation of chartered rights from the railroad companies to The Pullman Company because

- (a) The court had no jurisdiction to entertain a bill in equity wherein the plaintiffs pleaded that they were engaged in an illegal and unlawful enterprise in that the railroad company by contract attempted to delegate a part of their charter powers to a foreign corporation, namely, The Pullman Company, in view of the mandatory provisions of Article 6260, Revised Civil Statutes of Texas, which requires that only corporations chartered under the laws of the State of Texas may operate railroads in said state, and the damages as alleged by the plaintiffs to sustain jurisdiction were based upon interfering with the rights of the railroad companies and The Pullman Company under such invalid contracts, and
  - (b) The court had no jurisdiction to entertain the plaintiffs' bill which pleaded that some of the plaintiffs resided in the State of Texas and others resided without the State of Texas and it was not

alleged with certainty the specific damage, if any, suffered by each of the plaintiffs.

2

The court erred in holding that the Railroad Commission of Texas was without authority to promulgate the order complained of in that Article 6473 of Vernon's Annotated Revised Civil Statutes of Texas provides "if any railroad company \* \* \* shall charge or receive a greater rate, charge, or compensation than that fixed and established by the Commission \* \* \* such railroad company \* \* \* shall be deemed guilty of extortion;" and the pleadings and proof showed without contradiction that the defendant railroads by contract with the defendant, The Pullman Company, were charging rates, fares and tolls for the transportation of passengers that had not been fixed or promulgated by the Railroad Commission, and therefore the plaintiffs had no standing in a court of equity and no right to ask for equitable relief.

3.

The court erred in not sustaining the defendants' motions to dismiss the plaintiffs' bill of complaint because it appeared in said bill that the railroad companies had delegated to The Pullman Company a part of their charter powers, and in this indirect way the railroad companies were charging fares, tolls and rates for themselves in an amount in ex-

cess of the maximum sum allowed by the statutes of the State of Texas, and the railroad companies were doing indirectly what they cannot do directly, and therefore plaintiffs had no standing in a court of equity.

4.

The court erred in holding that the order complained of by the Railroad Commission of Texas was made without statutory authority, because the laws of the State of Texas are mandatory in requiring that said Commission make rules and regulations governing railroads, namely, Article 10, Section 2 of the Constitution of Texas, and Articles 6445 and 6474 of the Revised Civil Statutes of Texas, which provisions of the law authorize the Commission to make the order in question.

5.

The court erred in issuing a permanent injunction against the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, enjoining said parties from carrying into effect the order in question, because in doing so the court substituted its own opinion for that of the Railroad Commission of Texas.

6.

The court erred in holding that the Railroad Commission of Texas was without authority to promulgate a rate order, because Article 6448 of the Revised Civil Statutes of Texas imposes a duty upon the Railroad Commission to fix the rates of all railroads and because Article 6449 of the Revised Civil Statutes of Texas provides that ten days notice of such hearing shall be a sufficient notice, and in this case the order in question recited on its face that notice was issued on August 19, 1939, and hearing held on August 31, 1939, and the order recited that "the Commission thus finds that all parties interested in the subject matter have been duly notified for the time and in the manner provided by law," and said ruling of the court was in conflict with the decisions of the Supreme Court and the other courts. of the State of Texas, and the attack on said order in regard to said notice is a collateral attack and a collateral attack cannot be maintained against such an order.

7.

The court erred in holding that the attempts of the Railroad Commission of Texas to regulate the rates charged by the Pullman Company were void and that the Commission had no jurisdiction over the Pullman Company, because Title 71, Chapter 4, Revised Civil Statutes of Texas, and particularly Article 4477 of said statutes, imposes the mandatory duty upon the Railroad Commission to enforce the Public Health Sanitary Code of the State of Texas, and this was an order authorized by said code and the statutes in regard to the enforcement thereof.

The court erred in holding that the Railroad Commission had no authority to regulate the rates to be charged by The Pullman Company, because all railroads that do business in the State of Texas must be chartered under the laws of the State of Texas and all such railroads are under the direct supervision of the Railroad Commission, and the railroads cannot delegate their chartered powers to The Pullman Company by contract and thereby escape regulation of the Railroad Commission or create an agency free from regulation by the Railroad Commission.

9.

The court erred in entering a judgment enjoining the Railroad Commission of Texas, the members thereof, and the Attorney General of Texas, from enforcing the order in question, because the Railroad Commission of Texas had the authority to pass and enforce said order by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority on the Railroad Commission of Texas "to govern and regulate \* \* railroads" and "to correct abuses," and "to prevent \* \* abuses in the conduct of their business" (adopted 1911 and now codified as Article 6445 of the Revised Civil Statutes of Texas) and

the Legislature has not left it up to the Railroad Commission to define the "abuse," but the Legislature has defined the abuse involved in this case by saying that "unjust discrimination is \* \* \* prohibited and" it shall constitute unjust discrimination "if any railroad \* \* \* shall give any undue \* \* \* preference or advantage to any particular person \* \* \* or locality, or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever" (Article 6474 of the Revised Civil Statutes of Texas); and therefore, the Railroad Commission of Texas had the authority to adopt said order in question and enforce the same.

10.

The court erred in making any findings of fact of any kind because it is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better, and it is not proper for the court to determine which witnesses should be believed and which ones should be disbelieved, but it is only a question of whether or not there is any evidence on which the Commission's judgment can be founded, and as there was such evidence in this case the Federal Court cannot disturb or interfere with the Commission's judgments or orders.

11.

The court erred in making the findings of fact set

out in paragraph 7 of the court's findings of fact filed in this case, said findings of fact in said paragraph 7 beginning with the words "All of the Pullman porters in Texas" and ending with the words "there is no reasonable basis for finding contrary to the facts stated in this finding No. 7," because said findings of fact so set forth in paragraph 7 of the court's findings are contrary to the evidence and are not supported by the testimony and the evidence in this case.

#### 12.

The court erred in overruling and in not sustaining the plea of the defendants to the jurisdiction of the court, and their motions to dismiss, because the plaintiffs in this case had no standing in a court of equity, for the reason that they relied on contracts between the railroad companies in this case and The Pullman Company, and said contracts between said railroad companies and The Pullman Company are monopolistic and violate both the United States and the State laws prohibiting trusts and monopolies and contracts in rescraint of trade, and said contracts so relied on and pleaded and urged by the plaintiffs are void and illegal.

13.

The court erred in holding (as stated in paragraph 2 of the court's conclusions of law) that the railroads are necessary and proper parties to this ac-

tion, because such a conclusion is contrary to the evidence and testimony in this case and contrary to law.

#### 14. .

. The court erred in holding (as stated in paragraph 6 of the court's conclusions of law) that the challenged orders in question were not within the powers delegated to the Railroad Commission of Texas because the Railroad Commission has authority by virtue of the fact that the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses (Article 10, Section 2, Constitution) and the Legislature has passed such a law and has conferred authority upon the Railroad Commission of Texas "to govern and regulate \* \* \* railroads". and "to correct abuses," and "to prevent \* \* \* abuses in the conduct of their business" (Auopted 1911, and now codified as Article 6445, Revised Civil Statutes of Texas), and the Legislature has not left it up to the Railroad Commission of Texas to define the "abuse." but the Legislature has defined the abuse involved in this case by saying that "unjust discrimination is \* \* \* prohibited" and it shall constitute unjust discrimination, "if any railroad \* \* \* shall give any undue \* \* \* preference or advantage to any particular person or locality or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever;" and because of said provisions of the law of Texas, the Railroad Commission has authority to make and enforce such order.

15.

The court erred in holding (as stated in paragraph 7 of the court's conclusions of law) that the power to issue the challenged order in question is not derived from Article 6445 of the Revised Civil Statutes of Texas, because said Article 6445 authorizes the Railroad Commission of Texas "to govern and regulate \* \* \* railroads" and "to correct abuses" and "to prevent \* \* \* abuses in the conduct of their business," and the failure of the defendants to comply with the order in question, that is, operate sleeping cars on lines of railroads in Texas without said cars being in the charge of a Pullman conductor, and operate sleeping cars on other lines with Pullman conductors in charge, is an abuse under the facts in this case, and has been defined as an abuse by the Legislature of Texas under Article 6474 of the Revised Civil Statutes of Texas; and therefore the Railroad Commission of Texas had authority to make the order in question.

16.

The court erred in holding (as stated in paragraph 8 of the court's conclusions of law) that no Texas Statute has defined as an abuse, or prohibited, the operation of a sleeping car that is not in charge of a Pullman conductor, because the Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses and the Legislature of Texas has passed said law, to-wit: Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

17

The court erred in holding (as stated in paragraph 9 of the court's conclusions of law) that the challenged orders are not within the authority delegated to the Railroad Commission of Texas by Article 6474 of the Revised Civil Statutes, because said Article 6474 provides that if any railroad shall give any undue preference or advantage to any particular person or locality it is an unjust discrimination, and under the facts in this case plaintiffs have been, and are now, operating sleeping cars on some lines of railroads without said cars being in charge of Pullman conductors, and at the same time have operated sleeping cars on other lines with said cars being in charge of a Pullman conductor and the operation of sleeping cars on different lines in different manners . in such fashion constitutes a discrimination and an abuse in violation of Article 6474.

18.

The court erred in hold 7 (as stated in paragraph 11 of the court's conclusions of law) that the Texas Legislature having enacted a full crew law requiring a crew of four men on a train, the Railroad Commission thereby has no authority to pass the order in question requiring Pullman conductors to be in charge of all sleeping cars, because said full crew law is a separate act of the Legislature and does not prevent the Railroad Commission of Texas from preventing abuses and discrimination as authorized by Article 10, Section 2, Constitution of

Texas, and Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas.

19.

The court erred in denying and overruling the defendant's motion to dismiss and in holding (as stated in paragraph 15 of the court's conclusions of law) that the defendant's motion to dismiss should be denied, because the plaintiffs' complaint failed to state a cause of action in favor of any plaintiff against any defendant upon which relief could be granted, in this to-wit, the complainant failed to allege that there was insufficient evidence or that there was no evidence before the Railroad Commission of Texas to support or justify the orders in question, or that said commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary and unreasonable, or that said order or the enforcement thereof constituted unlawful interference with interstate commerce, or that said orders of the enforcement thereof constituted a taking of the plaintiff's property without due process of law.

20.

The court erred in permanently enjoining the defendants from attempting to enforce the orders in question, because the jurisdiction of the United States District Court, where this case was tried,

did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the state action complained of, towit: said Railroad Commission action and order and the enforcement thereof, transgressed the Constitution of the United States and whatever "vague contours \* \* \* the Due Process Clause may place upon the exercise of the State's regulatory power," and therefore the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes, to adopt and enforce the said orders.

21.

The court erred in holding (as stated in the court's opinion and in its conclusions of law, and particularly in paragraph 6 of the Court's conclusions of law) that the orders in question are not within the powers delegated to the Railroad Commission, because the jurisdiction of the United States District Court, where this case was tried, did not rest on diversity of citizenship, and therefore the only question open to said Court was whether or not the state action complained of, to-wit, said Railroad Commission action and order and enforcement thereof. transgressed the Constitution of the United States and whatever "vague contours \* \* \* the Due Process Clause may place upon the exercise of the State's regulatory power," and therefore, the trial court did not have authority or power to adjudge or decree that the Railroad Commission was without statutory authority, that is, did not have authority under the Texas Constitution and statutes to adopt and enforce said orders.

## SUMMARY OF ARGUMENT

1

The trial court should have entered judgment for the defendants (appellants) in this case for the reason that the plaintiffs (appellees) did not allege or prove a cause of action, because (a) the plaintiffs' claim is based upon the contracts between the Pullman Company and the railroad companies and said contracts are illegal and void by virtue of the fact that they call for charging passenger fares of more than three cents per mile in violation of the statutes of the State of Texas, (b) the plaintiffs' claim is based upon said contracts and said contracts are illegal and void because they contemplate that the Pullman Company will engage in operating a railway in this State, which is a violation of the law of the State of Texas because said company is not incorporated for such purpose under the laws of this State, and (c) this suit has not been properly brought under Article 6453 of the Revised Civil Statutes of Texas, which is the only law under which it can be maintained.

#### II

The Railroad Commission of Texas has authority under the Constitution and the statutes of the State of Texas to make and enforce the order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor. Therefore, the trial court erred in holding that the order was not sustained by the provisions of the statutes.

### III

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, is reasonable and contributes to the safety and welfare of the passengers, and therefore, does not violate the Fourteenth Amendment to the Constitution of the United States.

#### IV

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, and the enforcement thereof, does not unlawfully interfere with interstate commerce and it does not violate the interstate commerce provision of the Constitution of the United States.

У

As there was statutory authority for the making of the order in question, and as said order was rea-

sonable and did not violate the Fourteenth Amendment, the trial court erred in granting a "blanket" injunction in behalf of all of the plaintiffs covering all lines, because the facts showed that the situation of each plaintiff and each line was different and that possibly some of the plaintiffs were entitled to an injunction but that the other plaintiffs were not entitled to such relief, and because the facts further showed that the plaintiffs who possibly had a cause of action had not applied to the Commission, as provided in the order, for a modification of the order as applied to them. The evidence showed that some of the lines and runs were entirely within the State of Texas, but that a few of the other lines and runs crossed over into other states; and the evidence showed that the traffic was heavier and required a Pullman conductor more in the case of some lines and runs than in the case of other lines and runs.

#### ARGUMENT

I

The trial court should have entered judgment for the defendants (appellants) in this case for the reason that the plaintiffs (appellees) did not allege or prove a cause of action, because (a) the plaintiffs' claim is based upon the contracts between the Pullman Company and the railroad companies and said contracts are illegal and void by virtue of the fact that they call for charging passenger fares of more than 3 cents per mile in violation of the statutes of the State of Texas, (b) the plaintiffs' claim is based upon said contracts and said contracts are illegal and void because they contemplate that the Pullman Company will engage in operating a railway in this State, which is a violation of the law of the State of Texas because said company is not incorporated for such purpose under the laws of this State, and (c) this suit has not been properly brought under Article 6453 of the Revised Civil Statutes of Texas, which is the only law under which it can be maintained.

(a)

Article 6416, Revised Civil Statutes of Texas, reads in part as fellows:

"The passenger fare on all railroads in this State shall be three cents per mile. . . ."

Article 6473, Revised Civil Statutes of Texas, reads in part as follows:

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, ... on the line of its railroad, or any line operated by it, ... or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less

than one hundred nor more than five thousand-dollars."

Thus, we see that by virtue of said Article 6416 the maximum fare that a railroad company can charge is 3 cents per mile, and that by virtue of said Article 6473 if a railroad charges a greater compensation for the transportation of passengers than the amount allowed by the Commission it is guilty of "extortion."

If a railroad company makes a contract to violate said above quoted statutes, that is, makes a contract to charge fares in excess of the amount allowed by law, such a contract would undoubtedly be void. Such appears to be the law according to the case of Thomas v. West Jersey Railroad Company, 101 U. S. 71, in which this court said:

"... it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment... Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more is done under a contract forbidden by law, the stronger the claim to its enforcement by the courts."

The plaintiffs' cause of action was based upon the contracts between the Pullman Company and the

various railroads. In fact the plaintiffs alleged that "the action of the Commission . . . constitutes, in effect, an impairment of the obligation of said contracts in violation of that provision of the Conetitution of the United States denying any State the power to pass any law impairing the obligation of contracts." (R. 28) However, the proof shows conclusively that the contracts provide that passengers who ride on sleeping cars are to be charged one cent per mile in addition to the three cents per mile collected by the operating railroad company, a total of four cents per mile, and also are to be charged an additional sum for the use of berths and seats (R. 6); and the evidence shows that said terms of the contracts are actually carried out (R. 79 to 180). We submit that this amounts to charging a passenger fare of more than three cents per mile, and is a direct violation of Article 6416 and Article 6473. quoted above. The plaintiffs have no right to maintain a cause of action based upon an illegal contract and unlawful acts.

A case construing said Article 6416 that we think supports our contention is the case of Southern Pacific Company v. Patterson, 27 S. W. 194, by the Texas Court of Civil Appeals, in which it was held that said statute prohibited an extra fifty cents charge per person being made (so as to cost the passenger a total of more than three cents per mile) for crossing a bridge belonging to another company that was used by the railroad hauling the passenger. The court said:

"... We are of opinion that it was not in the power of the defendant... to make, or authorize to be made upon its right of way, an improvement, and thereby create the right to demand more than the lawful rate per mile for travel over it...."

We believe that in this case the plaintiffs' cause of action, if any, depends upon a state of facts whereby the plaintiffs are charging more than the maximum lawful rate of three cents per mile for passenger fares. The plaintiffs should not be allowed to maintain such a suit.

(b)

Article 6260, Revised Civil Statutes of Texas, reads as follows:

"No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State." (Italics ours)

In the case of Philip A. Ryan Lumber Co. v. Ball, 197 S. W. 1037, by the Texas Court of Civil Appeals, First District, the Philip A. Ryan Lumber Company was a Tennessee corporation, and it made a contract to buy timber from Ball to be used in the lumber company's sawmill, and the contract provided that the lumber company would transport the timber from the forest for a distance of six miles by means of a logging railroad. In the contract it was agreed

that Ball would build the railroad and that the lumber company would furnish the engines and cars. Ball refused to carry out the contract, and in a suit by the lumber company for damages because of breach of contract the court held that the contract was illegal in that it contravened Article 6260 (then 6406), and the court said:

"... we can see no reason why appellant, under the agreement it here undertook, would not have been under the bar of article 6406, Revised Statutes of Texas, passed by the Legislature in 1903 (Acts 1903, p. 90), and in effect ever since..."

In this case the Pullman Company's rights and cause of action, if any, exist by virtue of the contracts by which it furnishes cars, with an operating crew, to be operated on railway lines in Texas, although the company is not chartered under the laws of Texas. This suit has been brought to enjoin the Railroad Commission of Texas and the other defendants from interfering with said contracts. (R. 28, 29, 30) In the Philip A. Ryan Lumber Company case the lumber company only furnished and operated cars and engines on a logging railroad, and in this case the Pullman Company furnishes and operates sleeping cars of main line passenger railroads. The Pullman Company is clearly violating said Article 6260, and its suit cannot be maintained.

It might be contended that the Pullman Company is not operating a railroad in this case, but that it

has turned its cars and operating employees over to the various Texas railroad companies, and said companies are really doing the operating, but such argument is not tenable in view of the language in the case of *Pennsylvania Railroad Co.* v. St. L. A. & T. H. R. Co., 118 U. S. 290, which reads as follows:

"We think it may be stated, . . ., that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchise, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.

"... A contract to perform for the Indianapolis and St. Louis Railroad Company obligations which it was forbidden to assume, and which it had no authority to assume, must itself be void. There is no power shown in any these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and they cannot, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. We sincerely submit that the Pullman Company is engaged in operating a railroad in Texas, and as it is not chartered under the laws of Texas it is performing said operations illegally, and it and the other plaintiffs have no right to enjoin the Railroad Commission of Texas from doing anything that would interfere with said illegal operations.

(c)

We are submitting the hereinafter argument only in the event this Honorable Court does not see fit to sustain the foregoing contentions and argument.

As pointed out in the "statement of the case" above, the Railroad Commission of Texas held a hearing at which the parties to this suit appeared, in which it considered evidence, and thereupon made the order in question (quoted above). The Commission clearly had a right to hold such a hearing by virtue of Article 6450, Revised Civil Statutes of Texas, which says:

"The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

If the Pullman Company or any other party was dissatisfied with said order, said party is limited to

a direct appeal "to a court of competent jurisdiction in Travis County, Texas" as provided in Article 6453, Revised Civil Statutes of Texas. The Commission's orders are final if not appealed from in the manner prescribed in said Article 6453, and said orders cannot be questioned in a collateral attack. Said Article 6453 provides, in part, as follows:

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant..."

We sincerely believe that the Pullman Company and the other plaintiffs are confined to the procedure prescribed in said above quoted statute. Any other procedure or method of attack on the Commission's order would be a collateral attack. We state, without fear of contradiction, that unless a Railroad Commission order is void it cannot be questioned in a collateral attack. In the case of Texas Steel Co. v. F. W. & D. C. Ry. Co., 120 Tex. 597, in a Commission of Appeals opinion adopted by the Supreme Court of Texas, the court said:

"It is the settled law of this state that the Railroad Commission is a quasi judicial body.

Producers Refining Co. et al v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.), 13 S. W. (2d) 679.

"Since the Railroad Commission is a quasi judicial body it follows that an order regular upon its face made by the commission is not subject to collateral attack. Article 6452-6453, R. C. S. of Texas, 1925; West Texas Compress Co. v. Railway Co. (Texas Com. App.), 15 S. W. (2) 558; Producers Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id., 680; Railroad Commission v. Weld, 95 Texas 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission, 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App.), 36 S. W. (2d) 451."

In the case of Railroad Commission of Texas v. Beaver Reclamation Oil Co., 132 Tex. 27, in a Commission of Appeals opinion adopted by the Supreme Court of Texas, the court said:

"It is of course definitely settled that the general orders of the Railroad Commission are presumed to be reasonable and valid until attacked in a direct suit for that purpose, as provided by statute. It is also definitely settled that the validity and reasonableness of a general order cannot be attacked in a collateral proceeding such as is this suit. Railroad Commission v. Marathon Oil Co., 89 S. W. (2d) 517 (writ ref.); Turnbow v. Barnsdall Oil Co., 99 S. W. (2d) 1096 (writ ref.)." (Italics ours)

The plaintiffs never made it clear in the trial, to

our way of thinking, as to whether they were bringing a direct attack on the order as prescribed by said Article 6453, or were bringing a collateral attack. We think they intended for their suit to be a direct attack, that is, "a statutory suit against the Commission" under said Article 6453. But, the only case directly in point that we have found holds that such a suit cannot be maintained in a United States District Court, and that is the case of *Henderson* v. *Terrell*, 24 Fed. Supp. 147, which was a three-judge District Court case in which Judge Hutcheson of the Circuit Court of Appeals wrote the opinion and said:

"Though plaintiffs and defendants are both citizens of Texas, plaintiffs bring their suit as though in addition to being one arising under the Constitution and laws of the United States it is also one under the Texas statutes authorizing a review of the Commission's orders by suits filed against the Commission in the State District Court of Travis County. Authorized as plaintiff would be, if the requisite diversity existed, to bring their suit under the statute in the Federal District Court of Travis County, McMillan v. Railroad Comm. of Texas, D. C. 51 F. 2d 400; Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, we think it plain that, residents of Texas as they and defendants are, plaintiffs cannot maintain their suit as a statutory suit against the Commission in this court . . (Italics ours)

It is our belief that the only way the plaintiffs (appellees) can escape the rule stated by Judge

Hutcheson in the Henderson v. Terrell case, supra, is to shift their position and say that this is a collateral attack and not a direct attack in the form of a "statutory suit" under Article 6453. We now and hereby call on the appellees (plaintiffs) to advise the court and the appellants whether they are bringing a direct or a collateral attack in this case.

If the plaintiffs (appellees) have brought a collateral attack then they are limited to the contention that the order is void, that is, that the Railroad Commission of Texas had no authority to make it. We think the Commission had authority to make and enforce the order, which we will explain later in this brief. If it had such authority, and this suit of the plaintiffs' (appellees') is a collateral attack, the plaintiffs have no right to maintain their suit.

At this point we wish to call the court's attention to the fact that the defendants contended by motion to dismiss at the trial (R. 62), and now contend, that the plaintiffs' complaint did not state a cause of action because it did not allege that there was "insufficient evidence or no evidence before said Commission to support or justify said order, or that said Commission entered an order or orders contrary to the evidence before it, or that in view of the evidence before said Commission said orders were arbitrary or unreasonable." There is not a word in the plaintiffs' complaint alleging there was insufficient evidence before the Commission, and in view of the failure to make such an allegation we do not believe

the plaintiffs were entitled to complain about a lack of evidence.

In the case of Railroad Commission of Texas v. McDonald, 90 S. W. (2d) 581, by the Texas Court of Civil Appeals, Third District, a suit had been brought to review an order concerning motor carrier regulations, and the court said:

"The test is, not what the court's independent judgment might be, but whether there was substantial evidence before the Commission to sustain its order." (Italics ours)

As there were no pleadings raising the question of whether or not there was substantial evidence before the Commission in this case, the plaintiffs were not entitled to urge that as an issue or offer proof on that question.

H

The Railroad Commission of Texas has authority under the Constitution and the statutes of the State of Texas to make and enforce the order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor. Therefore, the trial court erred in holding that the order was not sustained by the provisions of the statutes.

The three-judge District Court decided this case on the theory that the Railroad Commission of Texas did not have the authority under the Constitution and statutes of Texas to make and enforce the order in question. We think the court was clearly in error in so holding. We will show that the Commission had unquestionable authority to pass and enforce this order, and in showing this we will prove the following:

- (a) The Constitution of Texas authorizes the Legislature of Texas to pass laws to correct abuses.
  (Article X, Section 2, Constitution of Texas.)
  - (b) The Legislature has passed such a law, and has created the Railroad Commission and conferred on it the authority "to govern and regulate... railroads" and "to correct abuses ... and to prevent... abuses in the conduct of their business." (Articles 6445 and 6448, Revised Civil Statutes of Texas)
- (c) The Legislature has defined an abuse by saying that "unjust discrimination is . . . prohibited and the following acts . . . shall constitute unjust discrimination. 1. If any railroad . . . shall charge . . . any person . . . a greater or less compensation for any service rendered . . . by it than it charges . . . other persons . . . for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person . . . or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever," (Article 6474, Revised Civil Statutes of Texas)

(d) The order in question is the correction of an abuse of the kind defined by the Legislature (described in paragraph (c) above) and, the Legislature having authorized the Railroad Commission to correct such abuses, said order of the Railroad Commission is valid.

Stated briefly in other words, we will show that by a provision of the Constitution of the State and an act of the Legislature the Railroad Commission, of Texas has authority to regulate railroads and correct abuses, and that this is an order regulating railroads and correcting an abuse, and that the abuse it corrects has already been defined by the Legislature.

Article X, Section 2, of the Constitution of Texas, was adopted by a vote of the people in 1890, and it is still in effect, and reads as follows:

"Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable." (Italics ours.)

In 1891, the Legislature of Texas created the Railroad Commission of Texas consisting of three men (General Laws of Texas, 22nd Legislature, 1891, p. Now Chapter Eleven, Title 112, Revised Civil Statutes of Texas.) However, it has been held by the Supreme Court of Texas that the powers of the Railroad Commission are not derived from Article X, Section 2, of the State Constitution, but that the Railroad Commission is a creature of statute and does not derive its power from the Constitution, and that the Legislature could confer on it "governmental duties and functions" not mentioned in said Article X, Section 2. In fact, the Legislature has passed statutes giving the Railroad Commission authority over matters not mentioned in the Constitution of Texas, and not even connected with railroads; and the Supreme Court of Texas held these statutes valid. In the case of City of Denison v. Municipal Gas Company, 117 Tex. 291 (Supreme Court of Texas, 1928). the act of the Legislature authorizing the Railroad Commission to regulate gas production (known as the Cox Act) was attacked as not being authorized by Article X, Section 2, or by any other provision of the State Constitution, and the court held that the Legislature had authority to permit the Railroad Commission to regulate utilities in regard to matters other than those mentioned in the State Constitution, and the court said:

"In view of the wording of section 2, art. 10, the amendment definitely provided a constitutional grant and authority for these powers to be exercised by a body or agency other

than the Legislature itself, and solved the vexing question which had egitated the minds of the statesmen of the Legislature and the state, that the Legislature was required to do and perform these duties by its own actions.

"The fact that it makes certain that means and agencies of government with powers to fix and regulate rail rates and prevent abuses, etc., may be created by law, does not create a body over which the jurisdiction of the law-making body is limited to the making of rates and matters pertaining to railroads. It was made certhin that the Legislature could create agencies with such powers, and that the agencies so created could exercise those powers; but there is nothing in the amendment to section 2, art. 10, that ever remotely indicates that a body known as a Railroad Commission is created thereby, or that such agencies as may be created by the Legislaturé shall be limited in jurisdiction to powers pertaining only to railroads. (Italics theirs)

"If it be admitted and assumed that the amendment to section 2, art/10, is mandatory—that is, that it is made the imperative duty of the Legislature to create means and agencies which should exercise the powers and functions granted, it cannot be said with any reason that it thereby itself created such agencies, or that it created what was called, and is now known as, the Railroad Commission of Texas, or that this provision even directed or commanded the Legislature to create this particular body. Even if we construct the words used, 'May provide and establish,' as mandatory, yet we are bound

to construe their clear meaning to be that the Legislature 'may provide and establish . . . means and agencies . . . as may be deemed adequate and advisable' by it. (Italics theirs) We will not strain them to mean a limitation upon the Legislature to limit such agency or any agency to the exercise of powers pertaining only to railroads. (These italics ours.)

".... The Constitution gives such broad latitude to the Legislature as to how it shall effect and accomplish the objects and purposes named that we are constrained to hold that these provisions do not so limit these means and agencies to exclusively railroad matters as to prohibit the Legislature from referring to them other governmental duties and functions." (Italics ours)

There can be no question that the Legislature of Texas has the power to authorize the Railroad Commission to regulate the operation of sleeping cars in the manner it has endeavored to regulate them in this case. The remaining question is whether or not it has so authorized the Railroad Commission.

The Legislature of Texas has authorized the Railroad Commission to correct abuses and to prevent abuses in the conduct of their (railroad's) business. Article 6445, Revised Civil Statutes of Texas, was originally passed by the Legislature in 1911 (Senate Bill 169, 32nd Legislature, 1911, p. 157), and changed slightly in wording in the recodification of 1925 (adopted by 39th Legislature, 1925), and now reads as follows:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix divisions of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law." (Italics ours)

Article 6448, Revised Civil Statutes of Texas, was originally passed as a part of the act creating the Railroad Commission in 1891 (General Laws of Tr. as, 22nd Legislature, 1891, p. 55), and changed aghtly in wording in the re-codification of 1925 (adopted by 39th Legislature, 1925) and now reads in part as follows:

"1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger freight on the different railroads in this State."

Thus, we see that the two above quoted statutes, to wit, Articles 6445 and 6448, authorize the Railroad Commission to correct abuses in the conduct of their (railroad's) business. In commenting upon said Article 6448 (which was formerly numbered 4562) the Supreme Court of Texas in the case of Railroad Commission v. Galveston Chamber of Commerce, 105 Tex. 101, said:

"It is apparent that it was the purpose of the Legislature to confer upon the Railroad Commission ample powers and a liberal discretion over this important matter. Indeed, the character and importance of the business of transportation of freight and passengers in the extensive and varied territory placed under the control of the Commission could not be successfully handled by fixed rules of law. The varied interests to be served and the many difficulties to be overcome, as well as conflicting interests to be properly adjusted demanded flexible rules. The Railroad Commission was constituted an independent department of the government which should represent the interests of the people and the railroads, and to the accomplishment of that purpose the courts will contribute a just and liberal interpretation of the law."

We will now take up the question of whether or

not the order in question deals with an abuse (of the kind the Railroad Commission is authorized to correct), and whether or not said order is a correction of said abuse. We submit that said order corrects an abuse that has already been declared an abuse by the State Legislature in Article 6474, Revised Civil Statutes of Texas, which reads in part as follows:

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination."

- "1. If any railroad subject hereto ... shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from other persons, firms or corporations for doin a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.
- "4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars."

It is true that said Article 6474 does not use the word "abuse", but it imposes a duty on the railroads and

that duty is that they shall not charge any person a greater or less compensation for any service rendered by it than it charges other persons for doing a like service, or "give any undue or unreasonable preference or advantage to any particular person . . . or locality"; and it provides a penalty for failing to discharge such duty. The imposition of such a duty on the railroads with a provision for a penalty in case of violation constitutes a sufficient definition of an abuse according to the only Texas appellate court case we can find on the question, to wit, the case of State v. St. Louis South estern Ry. Co. of Texas, 165 S. W. 491, by the Texas Court of Civil Appeals, Third District. That was a case in regard to the providing of depot facilities, and the court said:

"The Constitution empowers the Legislature to correct abuses, and this power may be delegated to the Railroad Commission. Section 2, art. 10. But the commission is not authorized to enact a law declaring what shall constitute an abuse. This can be done only by the Legislature . . . 'a disregard of a duty' imposed by legislative enactment is an abuse. This is admitted by appellees, as will appear from the following excerpt from their brief: 'It is clear that, if the Legislature should, by express enactment require a thing to be done, and then provide that failure to do it should constitute an abuse, there could be no question of the sufficiency of the definition.' It is not necessary that the Legislature should use the word 'abuse'. It is sufficient that it has by law imposed a certain duty on railroads, and provided a penalty for failing to discharge such duty."

## (Italics ours)

The foregoing discussion shows (a) that the Legislature has the power to correct abuses, (b) that it has created the Railroad Commission and authorized it to correct abuses, and (c) that it has defined in Article 6474 as an abuse an act whereby a railroad "shall charge" . . . any person . . . a greater or less compensation for any service rendered . . . by it than it charges . . . other persons . . . for doing a like . . . service, or shall give any undue or unreasonable preference or advantage to any particular person . . . or locality." Now, if the order in question is designed to correct the kind of "abuses" that are defined in said Article 6474 then the order is autorized by the statutes of the State of Texas. We will now discuss whether or not the order in question is designed or intended to correct the "abuses" designated in said Article 6474.

Article 6474 says that a railroad shall not "give any undue or unreasonable preference or advantage to any particular person . . . or locality." The order in question recites that the Commission heard evidence and found that seventeen operations (runs) operate Pullman cars without Pullman conductors and that all other runs have Pullman conductors in charge of the Pullman cars, and "that the failure to have Pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pull-"

man conductors; that in every instance the same rates and fares are exacted by the Railroad Companies and the Pullman Company and in one instance the services of a Pullman conductor are offered and in the other instances, namely, the seventeen operations, such services are not rendered": and the order further recites "the failure on the part of the railroad companies and that of the Pullman Company to thus provide such service and protection to such passengers is an abuse, a disadvantage and an undue and unjust discrimination against all passengers who ride on any one or more of said seventeen operations where Pullman conductors are not used." Thus, we see that the order is designed and intended to correct one of the abuses defined in Article 6474. We cannot conceive how it would have been possible to have come any closer to making a finding of facts that constitute an abuse within the meaning of Article 6474 than was done in this order.

When a railroad company operates a Pullman car that is in the charge of a Pullman conductor on some of its lines, and operates Pullman cars without a Pullman conductor on other lines, that is clearly giving a "preference" and an "advantage" to the passengers who ride on the Pullman car on which there is a Pullman conductor, and it is likewise giving a "preference" to the localities through which the lines operate that have Pullman cars with Pullman conductors. In other words, the passengers who ride on the different lines pay the same fare, but some of them receive the services of a conduc-

tor and are given the comfort and safety that is assured by the presence of a conductor, but the persons riding on the other lines do not receive such benefits or safety or comfort. It is clearly an "unjust discrimination" as defied in said Article 6474, and therefore it constitutes an "abuse" and can be prohibited by the Railroad Commission.

Suppose, for example, that a railroad operated passenger coaches over some of its lines without heating them in cold weather, but on other lines it properly heated them. As another example, suppose that a railroad operated its sleeping cars on some lines without wash-room facilities, but operated those on its other lines with proper wash-room facilities. Both of said examples clearly constitute a discrimination, and therefore an abuse, just the same as the facts as found by the Commission in this case constitutes a discrimination and an abuse under Article 6474.

We must not overlook that part of Article 6474 which says that it is an unjust discrimination "if any railroad . . . , directly or indirectly, . . . , shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from other persons, firm or corporation for doing a like and contemporaneous service." Transportation obviously involves more than the mere hauling of a person from one place to another. The arrangements made for a passenger's comfort compose a large part

of the consideration for the fare which he has paid. Compare the situation of a man riding in a flat car unattended by a conductor or a porter with that of the passenger on an ordinary passenger train. If he has been charged \$6.00 for riding from Austin to Dallas it is obvious that he is paying more for what he is getting, i. e., bare transportation, than is the man who pays \$6.00 to go from Austin to Dallas, but who sits in a plush seat and is attended by a porter and a conductor. The extent that one gets more service and comforts than the other is the exact extent that the other receives less for his money, and and therefore pays more for what he gets. Translating it to the facts in this case: one man gets a Pullman seat and berths, and he is attended by both a porter and a Pullman conductor, while another man paying the same mileage or compensation gets the Pullman seat and berth, and is attended by a porter, but is minus the services of the Pullman conductor. He receives less for his money than does the other. Correspondingly, the railroad has collected from him a greater compensation for the services rendered him than it has collected from the other person. We submit that this falls squarely within the "unjust discrimination" defined in sub-division 1 of said Article 6474.

There are no Texas appellate court cases involving this statute that have the same facts that we have in this case, but we are not without some authority. In the case of G. C. & S. F. Ry. Co. v. State, 169, S. W. 385, by the Texas Court of Civil Appeals,

Third District, (which was affirmed by the Supreme Court of the United States in the case of G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58) the Railroad Commission of Texas had ordered that two particular trains stop at the town of Meridian, Texas, each day. The facts showed that the railroad company stopped other trains at this town, but these two trains were the only trains with sleeping (Pullman) cars in them, and one of the reasons on which the order was based was that the people of that town did not have sleeping car service like other towns through which this company operated, such as the town of Clifton; and in upholding the Railroad Commission's order the court said:

"It is no answer to this to say that the companies are not required to furnish sleeping car accommodations. This may be conceded; yet, when they do furnish such accommodations to a part of the public, then we think they are required to furnish the same to all others, . . . . We think the court was justified in finding that adequate facilities were not afforded by appellant to the citizens of Meridian, when it failed to stop the only two trains furnishing sleeping car accommodations in and out of said town."

The Supreme Court of Texas had previously made a similar holding in the case of *H. & T. C. Ry. Co.* v. *J. L. & L. P. Smith*, 63 Tex. 322, decided in 1885. At that time, Article X, Section 2 of the State Constitution provided as follows:

"Railroads heretofore constructed, or that

may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The Legislature shall pass have to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state; and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." (Italics ours)

In construing that provision the Supreme Court of Texas said:

"The leading idea, and the one that seems most prominent in our legislation upon the subject under consideration, is that of equality. Railroads are declared public highways, and railroad companies common carriers, by the constitution. It is also declared by the constitution that the legislation shall pass laws to correct abuses and prevent unjust discriminations, etc. Art. X, sec. 2, Constitution.

"These railroad companies derive their chartered rights from the state; and they owe an equal duty to each citizen. Having secured from the state extraordinary rights and privileges, they ought not to be permitted to exercise them in such manner as to benefit one individual, town or community to the detriment of another. In the exercise of the duties which relate to the poblic, these companies must, upon general principles, deal alike with all customers." (Italics ours) That case shows clearly that as early as 1885 the Supreme Court of Texas construed the words "correct abuses and prevent unjust discrimination" to mean that the railroads could be compelled to "deal alike with all customers."

Some light is shed on this question by the cases of Railroad Commission of Texas v. H. & T. C. Ry., 90 Tex. 345, and I. & G. N. Ry. Co. v. Railroad Commission of Texas, 99 Tex. 332, both by the Supreme Court of Texas, and the legislation that followed as a result of those cases. The H. & T. C. Ry. Co. case was decided in 1897, prior to the passage of the present Article 6445 and Article 6448. In that case the Railroad Commission of Texas had made an order requiring all railroad companies to compress at the nearest compressing plant all cotton delivered for shipment, and the H. & T. C. Ry. Co. sought to enjoin the enforcement of the order on the ground that the Commission had no authority to pass it. The Supreme Court of Texas found that this matter was an abuse defined by statute, to-wit, Article 6474 (which was then Article 4574) in that it was an abuse for a railroad to haul one man's cotton compressed and to haul another man's cotton uncompressed; and, although Articles 6445 and 6448 were not in existence in their present words at that time, the court found that the Commission was authorized to prevent abuses by virtue of Article 4562, which at that time read:

<sup>&</sup>quot;The power and authority is hereby vested in the Railway Commission of Texas . . . to

adopt all necessary rates, charges and regulations, govern and regulate freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs..." (Italics ours)

Basing its opinion on the then existing Article 4562 (quoted above), and on Article 6474 (which was then Article 4574), the court said:

. we hold that the power here conferred. by the Legislature upon the commission emporeers it to correct abuses other than those which may be corrected with the rates of freight and passenger tariffs. The question, then, arises, what abuses can the railroad commission correct? We think that it must be some abuse which has been defined by the law, and that the commission would not, by this power, be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation. Has the legislature of Texas defined any act or acts as an abuse on the part of the railroad companies under which the commission would have power, in the suppression or correction thereof, to adopt the regulations in question? Article 4574, subd. 1. Rev. St., is in this language: 'It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.' We think that the railroad companies, in transporting cotton, might give undue and unreasonable preference or advantage to some particular person, company, firm, corporation, or locality, or might subject the cotton to undue and unreasonable delay, and that the regulations prescribed by the commission would be necessary to correct and prevent such abuses." (Italics ours)

The I. & G. N. Ry. Co. case (I. & G. N. Ry Co. v. Railroad Commission of Texas, supra) was decided in 1905. In that case the Supreme Court of Texas discovered for the first time that the title (caption) to the act of the Legislature embodying said Article 4562 (quoted above) was defective in that it did not refer to anything but rates; and as the Constitution of Texas requires that the title of an act refer to everything covered by the body of the act it was incumbent upon the court to hold that said Article 4562 did not include any abuses except rate matters. The court did not set aside its reasoning in the H. & T. C. Ry. Co. case (90 Tex. 345), but only revised its construction of said Article 4562 and limited it to abuses on rate matters; and the court said:

"If this provision (Art. 4562) was intended to confer upon the commission the independent power to correct any abuse 'which has been defined by law,' then as we think, we should be constrained to hold the enactment, so far as it attempted to confer that power, invalid, because it was not expressed in the title of the original act. . . The matter of correcting abuses is nowhere mentioned. . . . The question of the constitutionality of the part of the act then

under consideration was not certified to us in that case, nor was it alluded to in the argument. Hence, it was not considered. . . .

Shortly after the I. & G. N. Ry. Co. case, which limited the correction of abuses by the Railroad Commission of Texas to rate matters, because of the defective title of the original act, the Legislature passed a new act, which was Senate Bill 169, 32nd Legislature, Acts 1911, p. 157 (which is copied in full and marked Exhibit "C" in the appendix of this brief); and we contend that it passed said Senate Bill 169 as a result of the crippling of the right of the Railroad Commission to correct abuses, and that the Legislature passed it for the direct purpose of giving the Railroad Commission statutory authority to correct abuses other than rate abuses, to-wit, abuses like the one in question in the case now before the court. We call the court's attention to the fact that Section 1 of the bill (which is the present Article 6445) enumerated the abuses the Railroad

Commission could correct, and then it concluded with an all-inclusive clause as follows:

"... and to correct and prevent any and all other abuses in the conduct of their business."

We also call to the court's attention that Section 7 of the bill said:

"That the fact that there is no adequate law for the regulation of such . . . corporation, and the urgent necessity for such law, creates an emergency. . ."

We submit that said Senate Bill 169 (which included the present Article 6445) was specifically passed to give the Railroad Commission authority to correct abuses like the one in question, and that it did give such authority.

Another significant change that we wish to call to the court's attention is that in 1925, when the Legislature of Texas adopted a new recodification of the civil statutes, Article 6448 came into existence in its present words for the first time. Prior to that time, Section 1 of the article similar to the present Article 6448, used the word "tariff," and now Article 6448 uses the word "traffic." We believe this is a significant change in the wording of that article. We believe that Article 6448 authorizes the Railroad Commission to correct abuses other than rate abuses, and that Article 6445 likewise authorizes the Railroad Commission to correct abuses other than rate abuses. Both articles, so far as their present

wording is concerned, have been passed by the Legislature since the authority of the Railroad Commission to correct abuses other than rate abuses was crippled by the opinion in the I. & G. N. Ry. Co. case (99 Tex. 332); and it is our contention that these two articles were adopted for the prime purpose of curing the defects in the Commission's authority that were raised in that opinion.

We see that Articles 6445 and 6448 authorizes the Railroad Commission of Texas to correct abuses. Article 6474 was merely intended to define as an abuse an act whereby a railroad "shall give any undue or unreasonable preference or advantage to any particular person . . . or locality." We sincerely submit that the Honorable three-judge trial court was in error when it said in its opinion: "There is no Texas statute which forbids the operation of a train, carrying a Pullman car without a Pullman conductor, nor is there any statute that defines such action as an abuse." (R. 362) The court also erred when it said: ". . . it (the order) cannot stand as a correction of an abuse, because the so-called abuse has not been defined or prohibted by law." (R. 363)

The three-judge trial court apparently decided this case on the theory that only an "unjust discrimination" could be prohibited or corrected. It said: "It will be noted that the statute denounces unjust discrimination"; and it then quoted from the case of St. Louis Southwestern Ry. Co. v. State, 113 Tex. 570, wherein it construes the meaning of the word

"unjust". It is true that an "unjust discrimination" is prohibited, but the trial court fell into error, as we view it, when it sought to define and construe the term "unjust discrimination" as it understood the term in common usage, because in Article 6474 the term "unjust discrimination" is defined as being a case in which a railroad gives "any undue or unreasonable preference or advantage to any particular person... or locality." Therefore, the term having been defined, the court should not have concerned itself with the ordinary meaning of the term, but it should have looked at the definition and determined if the acts that the order seeks to correct come within that definition.

The ultimate question that the court should have decided was this: Does the operation by a railroad of sleeping cars with Pullman conductors on one line and the operation of sleeping cars without Pullman conductors on another line constitute an "undue or unreasonable preference" to the persons who ride the line where there is a Pullman conductor on the sleeping cars, or to the localities through which said line runs, over the persons who ride the line where there is no Pullman conductor on the sleeping cars, or to the localities through which that line runs? The three-judge trial court apparently did not decide that question.

That question calls for deciding whether or not the preference shown between persons and localities by having Pullman conductors on some lines and not on others was an undue or unreasonable preference. What is meant by undue or unreasonable?

Whether or not the preference shown between persons and localities by operating sleeping cars in a different manner (with and without Pullman conductors) on the various lines was undue or unreasonable is a question of fact to be decided by the Railroad Commission of Texas. Article 6450, Revised Civil Statutes of Texas, reads as follows:

"The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

A hearing was held and evidence considered, and after said hearing the Commission made findings of fact and entered the order in question. It-found from the evidence that having Pullman conductors on some runs and not having them on other runs constituted an undue discrimination in favor of those lines that had the Pullman conductors. Such a finding cannot be disturbed by a court unless it is unsupported by any evidence. Perhaps the three-judge trial court in this case would have held differently, that is, that the discrimination was not undue or unreasonable, if it had had the privilege of deciding on the conflict of evidence in the original hearing, but

it did not have that privilege as that was a matter for the Commission to decide. We submit that there was substantial evidence to support the Commission's finding, and therefore it cannot be set aside. We have outlined said evidence in the "statement of the case" above in this brief.

In the case of Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59 (Supreme Court of Texas, 1939), suit was brought against the Railroad Commission of Texas and others to set aside one of its orders granting a permit to drill an oil well, and in commenting on the findings of fact by the Commission the court said:

"... To our minds, the law contemplates that the fact findings made by the Commission in passing upon such applications are subject to review and correction by the courts only to the limited extent hereinafter stated. The court. on appeal from the Commission's order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evi-Stated in another way, the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evidence. 34 Tex. Jur., p. 712, sec. 11, and authorities there cited. To permit the court to substitute its fact findings on controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary, would destroy all uniformity of Commission administration thereunder..."

A similar holding was made by this Honorable court in the case of *Manufacturers Railway Co. v. United States*, 246 U. S. 456, which was an appeal in a suit to enjoin the enforcement of an Interstate Commerce Commission order. In that case the court said:

"Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (Inter-state Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

<sup>&</sup>quot;... The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different

finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. . ."

The same holding was made in the case of Nash-ville, C. & St. L. Ry. v. Tennessee, 262 U. S. 318, in which the court, speaking through Mr. Justice Brandeis, said:

"Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by \$2 and §3) only that discrimination which is unreasonable; undue, or unjust. Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U.S. 197, 219, 220; Manufacturers Ry. Co. v. United States, 264 U.S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made as a question of fact, on the matters proved in the particular case. . . " (Italics ours)

Thus, we see that under the Federal Act to Regulate Commerce, the question of whether or not "a preference or discrimination is undue, unreasonable or unjust" is "a question of fact" to be decided by the Interstate Commerce Commission. We sincerely

submit that the same rule applies in the case of the Railroad Commission of Texas in this case. In the very recent case of Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, this Court held that the findings of fact by the Railroad Commission of Texas in a hearing on the regulation of oil production should not be disturbed by a Federal court, where there was evidence on which to base the Commission's findings and order thereon, and this Court said:

"... It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

#### III

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, is reasonable and contributes to the safety and welfare of the passengers, and therefore, does not violate the Fourteenth Amendment to the Constitution of the United States.

Although the testimony from the witnesses in this case was conflicting, there was ample testimony to the effect that a Pullman conductor on sleeping cars contributes to the safety and welfare of the passengers. We will not repeat that testimony here, but we call it to the court's attention as narrated in the "statement of the case" (infra p. 12) in this brief. There being substantial evidence to support

the Railroad Commission's findings in the order, the United States District Court has no right to find to the contrary. In the case of Railroad Commision of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (heretofore referred to in this brief), this Court, in discussing an oil proration order of the Railroad Commission of Texas, said:

- "... For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment..."
- ".... Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

Our view is well expressed by the language of this Court in the case of Rochester Telephone Corp. v. United States, 307 U.S. 125, involving an order of the Communications Commission, in which this court said:

"Having found that the records permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

The earliest decision we have found that deals with a problem similar to the one we have here is the case of *Trenton Horse Railroad Co.* v. City of Trenton, 53 N. J. L. 132, 20 Atl. 1076, decided in 1890 by the Supreme Court of New Jersey, in which it was held that a city ordinance which required that there be a second man, in addition to the team driver, on every horse car, was reasonable and valid.

In the cases of C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453 and St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518, this court upheld the validity of the Arkansas statute which required a crew of an engineer, a fireman, a conductor and three brakemen on all freight trains of more than twenty-five cars operating on railroads fifty miles or more in length. In the C. R. I. & P. Ry. Co. case this Court said:

"... Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view. It is a means employed by the State

to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. . . "

The appellees (plaintiffs) in this case contend that it will work a financial hardship on them if they are required to have Puliman conductors in charge of their sleeping cars, but our answer to that argument is stated in the language of this court in the case of Chespeake & Ohio Ry. Co. v. Public Service Commission of West Virginia, 242 U. S. 603, as follows:

"One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. . . . That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's usiness, its productiveness, the character of ervice required, the public need for it, and its effect upon the service already being rendere, are also to be considered..."

Instead of using our own language as argument

we will use the language of the United States Circuit Court of Appeals, Ninth Circuit, in the case of City and County of San Francisco v. Market Street Ry. Co., 98 F. (2d) 628, as follows:

"The constitutionality of an ordinance of the City and County of San Francisco, requiring street cars while carrying passengers in that city to be in charge of a motorman and a conductor is here involved.

"... there was substantial evidence to show that 'one-man' cars are not as safe as the 'two-man' cars. Notwithstanding the strong evidence to the contrary, it was for the legislative body to 'determine which side it wishes to believe. Our function is ended upon determination that the question was fairly debatable... Further, we may not 'set aside the ordinance because compliance with it is burdensome'... or that it may lead to bankruptcy.

"No one can question that the City and County of San Francisco was acting within the scope of its authority when it attempted to make safer the human beings in its cars and on its streets from death or injury due to the management and running of its street cars. No one knows better than the Board of Supervisors or the citizens themselves voting upon safety ordinances and dangers to be met and avoided in the crowded areas, the heavy grades, the fog, and the increased automotive traffic. The Supreme Court has repeatedly held that the same rule applies to those seeking to prove the unconstitutionality of municipal safety

ordinances as applies to acts of the Congress or the state legislatures when legislating in their broader areas of responsibility.

"Judicial notice is taken that the duties of the street car conductor require conducting the passengers into the car, including his assistance of the aged and young children, and crippled and infirm, in safely mounting the steep steps and reaching their seats in the moving vehicle. . . . The conductor also must keep from entering the car intoxicated or violently acting persons who may do injury to other passengers. If such persons have gained entry and cause disorder, it is the conductor's duty to restore order and, if necessary, eject the offender.

"It therefore appears that not only has the Railway not shown that the ordinance of 1935 is based on no fact from which may be drawn a rational inference that it contributes to the safety of street car traffic, but that the two-man requirement affirmatively appears to be reasonable." (Italics ours)

There was substantial evidence in this case showing that the presence of Pullman conductors on sleeping cars contributed to the safety of the passengers, that they kept order on the cars, including the handling of intoxicated persons and the prevention of misconduct by passengers, that they supervised the sanitation of the sleeping cars and operated the heating and cooling systems and cared for the aged and infirm persons and children placed in their care, that the porters were occupied with other

matters such as the making up of the beds, the sweeping of the floors and the care of the baggage, and that the train conductor was usually so occupied in the front part of the train that he could not devote any time or attention to the care or supervision of the Pullman cars. We sincerely contend that because of said facts the order in question does not violate the Fourteenth Amendment.

#### IV

The order in question, to-wit, the order requiring that all sleeping cars be in the charge of a Pullman conductor, and the enforcement thereof, does not unlawfully interfere with interstate commerce and it does not violate the interstate commerce provision of the Constitution of the United States.

Under the holdings of this court the enforcement of this order does not unlawfully interfere with interstate commerce. A state in the exercise of its police power for the protection of the people has a right to adopt laws and regulations requiring that railroads and other public utilities comply with certain requirements, if those requirements contribute to the safety and welfare of the people, even though laws and regulations apply in some instances to commerce between the states. Just because the matter regulated is a part of an interstate commerce transaction is no reason why the business can be conducted haphazardly and in disregard of the

state's laws that have been passed to make that business safe for the people concerned.

In the case of C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453, (heretofore referred to in this brief) the Arkansas statute that required a freight train crew of six men in certain cases was attacked as being unconstitutional on the ground that its enforcement interferred with interstate commerce. This court overruled such contention and said:

"It is not too much to say that the state was under an obligation to establish such regulations as were necessarily reasonable for the safety of all engaged in the business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their sources in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a federal court unless they are clearly inconsistent with some power granted to the general government, or with some rights secured by that instrument, or unless they are purely arbitrary in their nature. The statutes here involved is not in a proper sense a regulation of interstate commerce nor does it deny the full protection of the law. Upon its face. it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction of such commerce,

and for the protection of those engaged in such commerce."

We submit that that case is directly in point with the case under submission.

In the case of Missouri Pacific Railroad Company V. Norwood, 283 U. S. 249, this court again held that the Arkansas statute requiring a six man crew on freight trains in certain cases was valid and that the enforcement thereof did not interfere with interstate commerce.

In the case of *Smith* v. *Alabama*, 124 U. S. 465, this court held that the enforcement of a state law requiring all locomotive engineers to be examined and licensed by a board did not constitute an unlawful interference with interstate commerce in the case of a railroad operating between states, and it said:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state, and by the authority of its laws, that ordinarily by means of corporations exercising their franchises by limited grants from the state. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, proper management of which involves peculiar knowledge, training, skill, and

care. The safety of the public in person and property demands the use of specific guards and caution. \* \* The rules prescribed for their construction and for their management and operation, designed to pretect person and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

"In conclusion, we find, therefore, first, that the statutes of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the adin mitted power reserved to the states to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particular interest in which it touches those transactions at all, it is not in conflict with any expressed enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

Other cases dealing with the interstate commerce question and that support our contention are the following: C. M. & St. P. Ry. Co. v. Sloan, 169 U. S. 133; Atlantic Coast Line Railroad Co. v. Georgia, 234 U. S. 280; and A. T. & S. F. Ry. Co. v. Railroad Commission of California, 283 U. S. 380.

We sincerely submit that the enforcement of the Railroad Commission's order in this case does not constitute an unlawful interference with interstate commerce.

#### V

· As there was statutory authority for the making of the order in question, and as said order was reasonable and did not violate the Fourteenth Amendment, the trial court erred in granting a "blanket" injunction in behalf of all of the plaintiffs covering all lines, because the facts showed that the situation of each plaintiff and each line was different and that possibly some of the plaintiffs were entitled to an injunction but that the other plaintiffs were not entitled to such relief, and because the facts further showed that the plaintiffs who possibly had a cause of action had not applied to the Commission, as provided in the order, for a modification of the order as applied to them. The evidence showed that some of the lines and runs were entirely within the State of Texas, but that a few of the other lines and runs crossed over into other states; and the evidence showed that the traffic was heavier and required a Pullman conductor more in the case of some lines

#### and runs than in the case of other lines and runs.

The order provided specifically that if "it be the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provisions of the orders, \* \* \* the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force." The record in this case shows that no such consent was received by any of the plaintiffs (appellees).

We have not found any appellate court case dealing with a situation of this kind except the case of Henderson v. Terrell, 24 Fed. Sup. 147, (heretofore referred to in this brief) in which Circuit Judge Hutcheson wrote the opinion of the court. That was a case in which an attack was made on the validity of an order of the Railroad Commission of Texas limiting the production of gas in an area known as the "panhandle field." As argument in this case we will quote from the language of that opinion as follows:

"Plaintiffs made no showing that they had applied to the Commission for relief, either general or as to the particular wells they claimed water damage to. Not only is it in general their right to apply to the Commission for relief from particular inequities in any of the orders, but the orders in question make provision for their doing so.

"We can but assume that if they applied

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to the Commission for relief as to these particular wells, such exception will be made as to them, if their proof shows it necessary, as will prevent their being injured. Before us the evidence on the point is greatly conflicting. Plaintiff's' evidence, if believed, shows that the reduction as applied to these wells, is too great for The defendant's evidence is equally positive that it is not. Indeed, the showing we make here is that actual operations under the reduction have shown that no injury has occurred or will occur. Plaintiffs not having applied to the Commission for relief as to these wells, we do not find it necessary to make a determination as to this question. We must assume that the relief will not be denied upon plaintiffs' application, if they can show the existence of the conditions claimed."

An examination of the record in this case shows that there were seventeen different lines of railroads involved in this law suit; that some of them were in the dry western part of the State and others were in the wet coastal plain region; that some of them served the thickly populated sections of the State and others were operated in sparsely populated areas; that some of the railroads in question crossed the State line while others were operated entirely within the State, and that the traffic on some of said lines was heavy while that on other lines was comparatively light. The conditions of each line were different. Each plaintiff that thought that its line should not be subject to the terms of the order should have made application for an exemption. failed to do so, they were not entitled to come into a Federal Court en masse and obtain a blanket injunction enjoining the enforcement of the order in respect to everybody in every place at every time.

### CONCLUSION

For the reasons stated it is sincerely contended, and these appellants respectfully pray, that the judgment of the District Court for the Western District of Texas be reversed.

Respectfully submitted,

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The attorneys for the original plaintiffs (appel-

lees) in this case are Ireland Graves, Lowell M. Greenlaw, Herbert S. Anderson and Claude Pollard. The attorney for the intervening plaintiffs (also appellees) is Ireland Graves. The attorneys for the intervening defendants (also appellants) are Cecil A. Morgan and A. B. Culbertson. A copy of this brief has been delivered to each of said attorneys.

#### APPENDIX

## Exhibit "A"

# TEXAS CONSTITUTIONAL PROVISIONS RELEVANT TO THIS APPEAL

Article X, Section 2, Constitution of the State of Texas:

"Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

#### Exhibit "B"

# TEXAS STATUTES RELEVANT TO THIS · APPEAL

(All statutes listed below are included in Texas Revised Civil Statutes, 1925, or amendments thereto, and are compiled in Vernon's Annotated Civil Statutes of Texas.)

#### Article 6260:

## Art. 6260. Who may build

"No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State."

#### Article 6416:

## "Art. 6416. Passenger fare

"The passenger fare upon all railroads in this State shall be three cents per mile, with an allowance of baggage to each passenger not to exceed one hundred pounds in weight; provided, however, that, where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold, and that the minimum charges in no case shall be less than twenty-five cents; and provided, further that when the passenger fare does not end in five or naught, the nearest sum so ending shall be the fare; provided, that in no case shall children under ten years of age be charged a higher rate of fare than two cents per mile. Railroads shall be required to keep their ticket offices open for half an hour prior to the departure of trains, and upon failure to do so they shall not charge more than three cents per mile."

#### Article 6444:

"Art. 6444. Terms defined

"The term 'Commission' as used in this title means the Railroad Commission of Texas, and the term 'Commissioners' means the members of the Railroad Commission of Texas."

#### Article 6445:

"Art. 6445. Power and authority

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, beit and terminal railroads, and over all public wharves, docks, pier., elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property. to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

#### Article 6446:

"Art. 6446. Power to enforce rules, etc.

"The Railroad Commission of Texas is hereby vested with full power and authority to do and perform each act and duty authorized, directed or imposed upon it by the provisions of this title, and all railroads, persons, corporations, and associations subject to the control of the Commission shall be subject to the penalties prescribed by law for failure to comply with the rules, orders, directions or requirements of said Commission as severally provided in this title."

#### Article 6447:

"Art. 6447. The Commission

"Election.—The Railroad Commission of Texas shall be composed of three members, one of whom shall be elected biennially at each general election for a term of six years.

"Qualifications.—The members shall be resident citizens of this State, and qualified voters under the Constitution and laws, and not less than twenty-five years of age. No member shall be directly or indirectly interested in any railroad, or in any stock, bond, mortgage, security or earnings of any railroad, and should a member voluntarily become so interested his office shall become vacant; or should he become so interested otherwise than voluntarily, he shall within a reasonable time divest himself or such interest; failing to do this, his office shall become vacant.

"Shall hold no other office, etc.—No railroad commissioner shall hold any other office of any character, while such commissioner, nor engage in any occupation or business inconsistent with his duties as such commissioner.

"Oath, etc.—Before entering upon the duties of his office, each commissioner shall take and subscribe to the official oath and shall in addition thereto, swear that he is not directly or indirectly interested in any railroad, nor in the bonds, stock, mortgages, securities, contracts or earnings of any railroad, and that he will to the best of his ability faithfully and justly execute and enforce the provisions of this title, and all laws of this State concerning railroads, which oath shall be filed with the Secretary of State.

"Organization.—The commissioners shall elect one of their number chairman. may make all rules necessary for their government and proceedings. They may appoint a secretary at a salary not exceeding \$2,000.00 per annum, and not more than two clerks at salaries not exceeding \$1,500.00 per annum each, and such other experts as may be necessary. They shall be known collectively as the 'Railroad Commission of Texas,' and shall have a seal, a star of five points with the words 'Railroad Commission of Texas' engraved They shall be furnished with an office. at the Capitol, and with necessary furniture, stationery, supplies and all necessary expenses, to be paid for on the order of the Governor.

"Secretary's duties. The secretary shall

keep full and correct minutes of all the transactions and proceedings of the Commission, and perform such duties as the Commission may require of him.

"Expenses.—The Commissioners and their employes shall receive from the State their actual necessary traveling expenses while traveling on the business of the Commission, which shall include the cost only of transportation while traveling on business for the Commission, upon an itemized statement thereof, sworn to by the party who incurred the expense, and approved by the Commission.

"Sessions.—The Commission may hold its sessions at any place in this State when deemed necessary."

#### Article 6448:

"Art. 6448. Duties

"The Commission shall:

- "1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.
- "2. Fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes or subdivisions as may be found necessary

#### and expedient.

- "3/ Fix to each class or subdivision of freight a reasonable rate for each railroad subject to this title for the transportation of each of said classes and subdivisions. Such classifications shall apply to and be the same for all railroads subject to the provisions of this chapter. It may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed by railroads.
- "4. Fix and establish for all or any connecting lines of railroads of this State reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more such lines of such railroads.
- "5. When two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, fix the pro rata part of the charges to be received by each connecting line.
- "6. From time to time alter, change, amend or abolish any classification or rate established by it when deemed necessary. Such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.
- "7. Adopt and enforce such rules, regulations and modes of procedure as it may deem

proper to hear and determine complaints against the classifications or the rates, the rules, regulations and the determinations of the Commission.

- "8. Make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road and may establish for each railroad or for all railroads alike, reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays and legal holidays.
- "9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto.
- "10. Require each railroad subject to this title to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations for the accommodation of passengers; and to keep them well-lighted and warmed for the comfort and accommodation of the traveling public; and keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freight handled by such roads and such railways, and to obey the requirements of the Commission in respect thereto.
  - "11. See that all laws of this State concern-

ing railroads are enforced and that violations thereof are promptly prosecuted and penaltics due the State therefor are recovered and collected; and report all such violations with the facts in its possession to the Attorney General or other officer charged with the enforcement of the law. It shall investigate all complaints against all railroad companies. Suits between the State and a railroad shall have precedence in the courts."

#### Article 6449:

"Art. 6449. Notice

"Before any rates shall be established, the Commission shall give each railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place; and it shall have process to enforce the attendance of its witnesses, which shall be served as in civil cases."

#### Article 6450:

"Art. 6450. Rules for hearing, etc.)

"The Commission may adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies. and other parties before it, in the establishment of rates, orders, charges, and other acts required of it under this law; and no person shall be denied admission at such investigation."

## Article 6451:

"Art. 6451. May administer oaths, etc.

"Each Commissioner, for the purposes mentioned in this chapter, shall have power to administer oaths, certify to all official acts, and to compel the attendance of witnesses, and the production of papers, waybills, books, accounts, documents and testimony, and to punish for contempt as fully as is provided by law for the district court."

## Article 6452:

"Art. 6452. Rates conclusive

"In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by the Commission before the institution of such action shall be held conclusive, and deemed and accepted to be rasonable, fair, and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for the purpose in the manner prescribed by the two succeeding articles."

#### Article 6453:

"Art. 6453. Appeal

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause; and said appeal shall be at once returnable to said Appellate Court at either of its terms; and said action so appealed shall have precedence in said Appellate Court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. Provided further that no preliminary injunction shall be issued without notice to the opposite party and that no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be enforced with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparably (irreparable) and why the order was granted without notice, and shall by its terms expire within such time after

entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require."

#### Article 6454:

"Art. 6454. Burden of proof

"The burden of proof shall rest upon the plaintiff to show the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

#### Article 6471:

"Art. 6471. Witnesses

"In any examination or investigation provided in this chapter, the Commission is authorized and empowered to compel the attendance of witnesses, and may issue subpoenas for witnesses by such rules as they may prescribe, and such process shall be served by the officer to whom it may be directed. Each witness who shall appear before the Commission by order of the Commission, at a place outside the county of his residence, shall receive for his attendance one dollar per day and three cents per mile traveled by the nearest practical route, in going to and returning from the place of meeting of the Commission, which shall be paid by Comptroller upon the presentation proper vouchers, sworn to by the witness, and approved by the Commission. No witness shall be entitled to fees or mileage who is directly or indirectly interested in a railroad, or who is in anywise interested in any stock, bond, mortgage, security or earnings of such road, or was an officer, agent or employe of such road when summoned at the instance of such No witness furnished with transportation shall receive pay for the distance he may travel on such free transportation. The Commission may issue an attachment as in civil cases, for a witness who fails or refuses to obey a subpoena, and compel him to attend before the Commission and give his testimony upon such matter as shall be lawfully required by them. If a witness, after being duly summoned, shall fail or refuse to attend or to answer any question propounded to him, and which he would be required to answer if in court, the Commission may fine and imprison such witness for contempt, in the same manner that a judge of the district court might do under similar circumstances. The claim that any such testimony might tend to criminate the person giving it shall not excuse a witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

### Article 6473:

"Art. 6473. Extortion

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand or receive a greater rate, charge or compensation than that fixed and established by the Commission for · the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than one hundred nor more than five thousand dollars."-

#### Article 6474:

"Art. 6474. 'Unjust discrimination'

"Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

- "1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than its charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.
- "2. If any railroad company shall fail or refuse, under regulations prescribed by the Commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as the Commission may prescribe, fail or refuse to transport and deliver without delay or discrimination any passengers, ton age or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad; provided perishable freights of all kinds and live stock shall have precedence of shipment.
- "3. If any railroad company shall charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for the shorter line than for a longer distance over the same line; provided, that upon application to the Commis-

sion any railroad may in special cases, to prevent manifest injury, be authorized by the Commission to charge less for longer than for shorter distances for transporting persons and property, and the Commission shall, from time to time, prescribe the extent to which such designated railroad may be relieved from the operation of this provision. No injustice shall be imposed upon any citizen at intermediate points. Nothing herein shall be so construed as to prevent the commission from making what are known as 'group rates' on any line or lines of railroad in this State.

- "4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars.
- "5. Exceptions.—Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates, or to prevent railroads from giving free transportation or reduced transportation under such circumstances and to such persons as the law of this State may permit or allow."

#### Article 6476:

"Art. 6476. Penalty not otherwise provided

"If any railway company doing business in this State shall violate any provision of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided by law or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Commission, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollars."

### Exhibit "C"

## SENATE BILL 169, 32ND LEGISLATURE, ACTS 1911, p. 157

S. B. No. 109 Chapter 86.

An Act conferring authority upon the Railroad Commission, and making it its duty to adopt all necessary rates, charges and regulations to govern and regulate persons, associations, and corporations, private or municipal, owning or operating public wharves, docks, or piers, and all property used in connection therewith, or suburban, belt or terminal railroads in Texas, and to fix divisions of rates, charges and regulations between the same and railroads and all other common carriers under the control of the Railroad Commission where a deversion (division) is proper; providing that all laws made and prescribed for the government and control of railroads, shall, as far as applicable, be of equal force against such persons, associations and corporations; authorizing the Commission to require reports of such persons, associations, and corporations, and giving to said Commission power to correct abuses and prevent unjust discrimination and extortion in rates or

charges, of such persons, associations and corporations or any abuse by same; providing penalties for the violations of this Act, and declaring an emergency.

## BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Power and authority are hereby conferred upon the Railroad Commission of Texas over all public wharves, docks and piers and all elevators, warehouses, sheds, tracks and other property used in connection therewith in the State of Texas, and over all suburban, belt and terminal railroads in said State, and over all persons, associations and corporations, private or municipal, owning or operating any such railroad, wharf, dock, pier, elevator, warehouse, shed, track, or other property, and it is hereby made the duty of the said Railroad Commission to fix and adopt all necessary rates, charges and regulations, to govern and regulate said persons, associations and corporations, and to correct abuses and prevent unjust discriminations in the rates, charges and tolls of said persons, associations and corporations, and to fix divisions of rates, charges and regulations between same and railroads and all other common carriers, under the control of the Railroad Commission where a division is proper, and to correct and prevent any and all other abuses in the conduct of their business.

SEC. 2. If any person, association or corporation subject to the provisions of this Act, shall demand or receive a greater compensation for any service rendered or to be rendered than that fixed and established by the said Railroad Commission then, and in every such case, such person, association or corpor-

ation shall be deemed guilty of extortion and shall forfeit and pay to the State of Texas, a sum not to exceed five hundred dollars for each offense; provided, that if it shall appear that such violation was not wilful, said person, association or corporation shall have ten days to refund such over-charges or damages, in which case the penalty shall not be incurred, and the said Commission shall have authority and it shall be its duty to sue for and recover the same in the manner as may be prescribed by law for like suits against railroad companies.

- SEC. 3. If any person, association or corporation subject to the provisions of this Act shall by any special rate, rebate, drawback or other device, or in any manner directly or indirectly charge, demand, collect or receive from any other person, association or corporation a greater or less compensation for any service rendered, or to be rendered, by it then it charges, demands, collects or receives from any other person, association or corporation for doing a like and contemporaneous service, or if any such person, association or corporation shall make or give any undue or unreasonable preference or advantage to any other person, association or corporation, or to any locality, or shall subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage, then and in any such case the person, association or corporation thus offending shall forfeit and pay to the State of Texas a sum not to exceed five hundred dollars (\$500.00) for each and every offense.
- SEC. 4. Said Railroad Commission shall have the same power to make and prescribe rules and regulations for the government and control of all such persons, associations and corporations as is or may

be conferred upon said Commission for the regulation of railroad companies, and such persons, associations and corporations shall issue no stock or bonds, except such as are authorized by the Railroad Commission under the provisions of the railroad stock and bond law of this State.

SEC. 5. The said Railroad Commission shall have the authority, and it shall be its duty to call upon such persons, associations and corporations for reports, and to investigate their books in the same manner as is or may be prescribed by law for the regulation of railroad companies; and said Commission shall have power and authority to institute suits and suc out such writs and process as may be applicable and authorized for the regulation of railroad companies. All laws made and prescribed for the government and control of railroad companies, and the valuation of their properties, in so far as they are applicable, shall be of equal force and effect against all such persons, associations and corporations.

SEC. 6. If any such person, association or corporation or other party at interest, be dissatisfied with any decision, rate, charge, toll, rule, order, act or regulation adopted by the Commission, such dissatisfied person, association, corporation or party may file a petition setting forth the particular cause or causes of objection to such decision, rate, charge, toll, rule, order, act or regulation, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against such Commission as defendant, said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court, either paty (party) to said ac-

tion may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time of such right of action accruing, the suit may be filed during such term and stand ready for trial after ten days' notice.

SEC. 7. The fact that there is now no adequate law for the regulation of such persons, associations and corporations, and the urgent necessity for such a law, create an emergency and an imperative public necessity that the rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Approved March 20, 1911.

Becomes a law ninety days after adjournment.

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DEC 18 4949

CHARLES ELMORE CRAFLEY

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1940 No. 283

RAILROAD COMMISSION OF TEXAS, ET AL

THE PULLMAN COMPANY, ET AL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

Brief of the Interveners, M. B. Cunningham, W. A. Worley, W. M. Hadley and Order of Sleeping Car Conductors.

A. B. CULBERTSON

and

CECIL A. MORGAN

First National Bank Building

Fort Worth Texas

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Brief filed by the Attorney General a exception of Article 4477, which is qu in this Brief.	with

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#### IN THE

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(Opinion of Court Below is Reported in 33 Fed. Supp. 675)

Upon motion leave was granted by the Trial Court for the interveners to align themselves with the defendants in the Trial Court, appellants herein (Tr. 76, 77). The petition for appeal included said interveners (Tr. 371). The brief as filed by the Attorney General in this case has stated the grounds for jurisdiction, has made a comprehensive statement of the case, including specification of errors, together with a summary of argument and authorities, all of which is adopted by these interveners. Therefore, this brief will supplement the able brief of the Attorney General by enlarging upon certain points.

#### SUMMARY OF ARGUMENT

#### Point No. 1

THE PLAINTIFFS DID NOT ALLEGE OR PROVE ANY FACTS TO SHOW THAT THEY WOULD BE DAMAGED IF THE ORDER OF THE RAILROAD COMMISSION WAS PERMITTED TO STAND, THE ONLY DAMAGE ALLEGED OR PROVED BEING THAT THEY WOULD BE PREVENTED FROM COLLECTING ILLEGAL, UNAUTHORIZED AND EXTORTIONATE TOLLS AND FARES.

#### ARGUMENT AND AUTHORITIES

For the purpose of clearness the order of the Commission shall be herein referred to as it was considered in the Trial Court as the "challenged order". The challenged order was directed to, and made requirements of, only the railroads. It made

no requirement whatever of the plaintiff, The Pullman Company. It is fundamental that before a party can resort to a Federal Court of Equity to restrain and prevent an order of enforcement such as the one in this case he must show that he would be injured by its enforcement. *Heard* v. *Denman*, 29 SWR (2nd) 824.

The very basis of the plaintiffs' cause of action is the contracts between The Pullman Company and the railroads as stated in the plaintiffs' Bill of Complaint wherein it was pleaded:

"Each of the plaintiffs, excepting The Pullman Company, operates trains in or through portions of the State of Texas including Pullman cars furnished by The Pullman Company pursuant to contracts between The Pullman Company and the respective plaintiffs." (Tr. page 6, para. 2).

The contracts between the various railroads and The Pullman Company were offered in evidence by the plaintiffs and identified as Exhibits 2 to 14 inclusive. (Tr. 146).

In support of this pleading the plaintiff, The Pullman Company offered the witness Champ Carry, Vice President of The Pullman Company (Tr. 79) was testified concerning the contracts between the railroad companies and The Pullman Company as follows:

- "Q. All of these operations are under contracts between the Railroad—the particular Railroad and the Pullman Company?
  - A. Yes, sir, all of them.
- Q. Is there an arrangement in general between the Railroad and the Pullman Company whereby the Pullman Company and the Railroad share a part of the revenues from the Pullman fares on these cars?
- A. All of our contracts provide for the Railroads to share in the earnings if they reach a certain level. The gener is provisions of the contracts are that the Pullman Company first takes out the cost of the operation and then what we term as an initial return or profit for doing the business, and after that we divide any surplus that may be there. The contracts are generally—there are some little differences in the way that the division is made, but they are generally to the effect that there will be a division if the revenue is there." (Tr. 83).
- The plaintiffs further offered the witness V. H. Vroman, an employe of The Pullman Company serving in the capacity as assistant to the Vice-President in charge of operations who testified:
  - "Q. All right: Then, for the privilege of riding in the Pullman car the Railroad

Company does charge an extra fare, you know that, don't you?

A. Yes, sir.

Q. That is one cent a mile, isn't it, in Texas?

A. I believe it is.

Q. Then in addition to paying that extra railroad fare to ride in the Pullman car, the Pullman Company then charges an additional fare?

A. They charge for their accommodations.

Q. Well, that is an additional charge, though, in addition to the railroad fare, and then the extra fare to ride in the Pullman?

A. It is an additional expense to the passengers. You can't go to the theater without paying for it, and if you ride in a Pullman car you must pay for a seat or berth; that applies on both roads and on all roads.

Q. I understand and your charges are identical in every instance, whether there is a Pullman porter in charge or whether there is a Pullman conductor in charge?

A. That is right.

Q. All right; and the same—the same charges are made whether there are 10 Pullman cars or one Pullman car?

A. that is right." (Tr. 139, 140).

Therefore, the plaintiffs alleged and proved by their own witnesses that the fares and charges were in excess of the maximum sum allowed by the statutes of the State of Texas as provided in Article 6416 Revised Civil Statutes of Texas which provides:

"The passenger fare upon all railroads of this State shall be three cents per mile." etc.

Article 6473 Revised Civil Statutes of Texas, Extortion, provides in part:

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, ... or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion."

The only damage alleged or attempted to be proved was that the order, if in force, would prevent the plaintiff railroads and The Pullman Company from collecting additional fares and charges for the use of Pullman accommodations to those which the railroads charged; and that this would deprive them of the profits derived from the Pull-

man operations, which profits they had contracted between themselves to share.

Now if those extra charges and fares of which they would be deprived are themselves unauthorized and illegal and extortionate then they will not be injured by the enforcement of the order.

Article 6445 Revised Civil Statutes of Texas places all railroads "and other property used in connection therewith" under the supervision of the Railroad Commission. Likewise, it has power over all persons owning or operating such railroads "and other property to fix ... all necessary rates, charges and regulations." While we believe this article gives jurisdiction over The Pullman Company it is not necessary so to contend. It unquestionably has jurisdiction over the railroads and that is enough for this case.

Article 6448 Revised Civil Statutes of Texas provides:

#### "The Commission shall:

(9) Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto."

It is certain that the railroads could not provide their own sleeping car and other accommodations which they contracted with The Pullman Company to provide, and make the same charge therefor that it makes, without authority of the Railroad Commission. It would clearly be governed by the language of Article 6448 (9) "for all other services performed by any railroad", but the legislature left no doubt of its intention in this regard, and as if anticipating some subterfuge might be used it enacted Article 6473 Revised Civil Statutes of Texas which reads as follows:

"If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, . . ."

The testimony is without contradiction that the charges made by The Pullman Company and the railroad company to passengers riding in the Pullman cars is a sum in excess of the maximum sum as fixed by the statutes. Likewise, the testimony

is uncontradicted that the various railroads will participate in such profits. It is this loss that the plaintiffs are complaining of. The plaintiffs alleged and proved that the contracts between The Pullman Company and the railroad company provided that, The Pullman Company would have the exclusive right to provide sleeping car accommodations and to fix their charges therefor. The charges and fares thus collected were divided between the railroads and The Pullman Company and none of such charges or fares were ever fixed by the Railroad Commission. Thus, the plaintiffs plead and proved that they were engaging in an enterprise unauthorized by the Railroad Commission; that charges were being made in excess of the maximum sum allowed by law, and yet in a court of equity they complain that the Railroad Commission is attempting to deprive them of the fruits of these unauthorized and extortionate charges. We concur with the Attorney General of Texas that the Railroad Commission did have statutory authority to promulgate the challenged order. However, if it should be agreed, as urged by the plaintiffs, that the Commission was without authority to promulgate the challenged order, it is to be noted that the challenged order does not attempt to regulate The Pullman Company. It does not attempt to change or alter the fares and charges which are being made in excess of the statutory limitation. It simply provides that no extra charge shall be made to any

passenger for these extra accommodations wherein the railroads shall participate directly or indirectly, unless the standard of service as set out in the order be maintained.

The interest of the interveners in this case can be found from the testimony of the witness B. H. Vroman, who testified that he was an assistant to the Vice President of The Pullman Company, and his testimony in part was:

- "A. Well, we have employed no conductors for ten years, and they are all of them in the higher wage brackets.
- Q. You haven't hired any new conductors?
- A. I say not any. I know we took up one man at Cincinnati, but we haven't employed very many, two or three at some places. (Tr. 116)."

Therefore, by this process it is only a question of time until the Pullman Conductors will be completely eliminated.

#### Point No. 2

SPECIAL APPEARANCE IS UNKNOWN TO TEXAS PRACTICE AND WHEN PARTIES VOLUNTARILY SUBMIT TO THE JURISDICTION OF THE RAILROAD COMMISSION THEY CANNOT BE LATER HEARD TO COMPLAIN THAT THEY WERE NOT GIVEN PROPER NOTICE OF SUCH HEARING.

#### ARGUMENT AND AUTHORITIES

Article 6448 Revised Civil Statutes of Texas provides:

#### "The Commission shall:

- 1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.
- "6. From time to time, alter, change, amend or abolish any classification or rate established by it when deemed necessary. Such amended, altered or new classification or rates shall be put into effect in the same manner as the originals.
- "7. Adopt and enforce such rules, regulations and modes of procedure as it may

deem proper to hear and determine complaints against the classifications or the rates, the rules, regulations and the determinations of the Commission.

"9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have the power to prescribe reasonable rates, tolls or charges

for all other services performed by any railroad subject hereto." (Italics Ours).

The Supreme Court of Texas settled this point of special appearances in the case of Atchison, T. & S. F. Ry. Co. v. Stevens, 109 Tex. 262, 206 SWR 921, when Mr. Chief Justice Phillips, speaking for the Court, said:

"(1) An extended argument has been presented by the Railway Company upon the question of the Trial Court's jurisdiction under the service shown. In the state of the record, that is an immaterial question. A special appearance is unknown to our practice. The filing by a defendant of any defensive pleading, though it be only for the purpose of challenging the jurisdiction of the Court, constitutes an appearance and a submission to the jurisdiction of the forum. York v. State, 73 Tex. 651, 11 S. W. 869. The filing by the Railway

Company of its plea of privilege and later its answer was an appearance, and eliminates from the case any question of jurisdiction."

In this connection we respectfully submit that only railroads chartered under the laws of Texas are entitled to any notice, and in the case at bar they were given such notice, and in addition thereto we cite from the challenged order which is regular on its face, and recites:

- "(2) That upon request of the Pullman Company, through its attorney, a notice was issued in the manner and form provided by law, notifying all parties at interest that a full and complete hearing would be held in Austin, Texas, in the Hearing Room of the Railroad Commission on the 31st day of August, 1939, at which time all parties interested would be permitted to offer such evidence and present such facts as they may deem material to the issues involved.
  - (3) That the effective date of passenger circular No. 164 was extended until the 15th day of September, 1939, and upon request of counsel for the parties at interest, the effective date of said order has been postponed from time to time, the last extension thereof being until the 15th day of November, 1939.
    - (4) The Commission further finds that

on the 31st day of August, 1939, at 10 o'clock A. M. in the Hearing Room of the Commission in Austin, Texas, the following appearances were made:

Mr. Ireland Graves, of the law firm of Black, Graves & Stayton, of Austin, Texas,

Mr. L. M. Greenlaw, general counsel of the Pullman Company, Chicago, Illinois,

Mr. H. S. Anderson, assistant general solicitor of the Pullman Company, of Chicago, Illinois,

All on behalf of the Pullman Company.

Mr. Claude Pollard, Austin, Texas, representing all Texas railroads.

Culbertson & Morgan, attorneys, Fort Worth, Texas, appearing for the Order of Sleeping Car Conductors.

The Commission thus finds that all of the parties interested in the subject matter have been duly notified for the time and in the manner provided by law and that all of said parties entered an appearance in this cause and, with all parties having announced ready, the Commission proceeded to hear the oral testimony of seventeen witnesses, some of whom were offered by the railroad companies, the Pullman companies and the other parties at interest, as

well as documentary evidence, and after a full, final and complete hearing of evidence, which lasted for two days, and after argument of counsel, the Commission being fully advised in the premises Finds." (Tr. 38-39). (italics ours.)

In this connection it is interesting to observe the pronouncement of the learned Trial Court in the case at bar:

"The regulation cannot be sustained as a rate order for the reasons, first, it was not made after notice given as required by law, and second, it is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and the Pullman Company, which it is without any statutory authority to do. Furthermore, in so far as it attempts to regulate the rates charged by the Pullman Company it is void, as the Commission has no jurisdiction over the Pullman Company." (Tr. 363).

We respectfully submit that this pronouncement on the part of the Court is contrary to the express provisions of the statutes of this state and the decisions, namely Article 6449 Revised Civil Statutes of Texas, which provides:

"Before any rates shall be established, the Commission shall give each railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed;" (italics ours).

The Texas Courts likewise have had occasion to finally determine the issue as set forth in the case of Roco Refining Co. et al v. State et al, 94 SWR (2d) 1214 when the Court said:

"There is another reason why appellants' attack upon the validity of the orders, for their alleged failure to be based upon notice and hearing, cannot be sustained. The attack is a collateral one. Want, if any, of notice and hearing does not affirmatively appear upon the face of either of the orders. If it be true that the orders were issued without notice and hearing, it would require evidence to establish such facts. The District Court of Travis County alone has jurisdiction to determine that issue. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S. W. (2d) 364, 72; Johnson Refinery v. State (Tex. Civ. App.) 85 S. W. (2d) 948; and authorities there cited; Texas Steel Co. v. Ft. W. & D. C. R. Co., 120 Tex. 597, 40 S. W. (2d) 78, 81."

We think the exact question has been determined in the case of Texas Steel Co. v. Fort Worth & Denver City Ry. Co., et al, 120 Tex. 597, 40 SWR (2nd) 78. In that case the Court of Civil Appeals certified the question to the Supreme Court for answer in the following form:

"Question 1: Is the said Circular No. 5548 adopting said rates, void and subject to collateral attack for any of the following reasons, to wit:

- '(1) Because no notice was given to the railroads as provided by article 6449 of said Statutes of 1925, prior to the issuance of said circular? \*\*\*
- '(3) Because there appears to have been no evidence of the docketing of the cause, or hearing, or evidence, as provided by the rules of the Railroad Commission of Texas?""

The opinion of the Supreme Court says:

"The suit, in so far as it involves the above orders of the Texas Railroad Commission, is based upon the theory and contention that the above orders are absolutely and totally void for the several reasons set out in 'Question No. 1' propounded in the certificate from the Court of Civil Appeals. We overrule these contentions.

"It is the settled law of this state that the Railroad Commission is a quasi judicial body. Producers' Refining Co. et al. v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.) 13 S. W. (2) 679.

"Since the Railroad Commission is a quasi judicial body, it follows that an order

regular upon its face, made by the commission, is not subject to collateral attack. Articles 6452, 6453 R. C. S. of Texas 1925; West Texas Compress Co. v. Railway Co. (Tex. Com. App.) 15 S. W. (2d) 558; Producers' Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id. (Tex. Com. App.) 13 S. W. (2d) 680; Railroad Commission v. Wald, 95 Tex. 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission (Tex. Civ. App.) 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App.) 36 S. W. (2nd) 451."

Therefore, we submit (1) that The Pullman Company was not entitled to notice; (2) that notwithstanding the law The Pullman Company voluntarily. made its appearance before the Railroad Commission and spent two days participating in the hearing before such Commission, being represented by lawyers of its own choice, which said lawyers requested . of the Commission a re-hearing in the case, and it was upon the motion of The Pullman Company lawyers that such rehearing was granted to The Pullman Company and the railroads; and (3) since the case at bar in the Trial Court was a collateral attack upon an order issued by the Railroad Commission which was valid upon its face, plaintiffs could not complain of lack of notice. We submit the law is so well settled on this point that no one can disagree.

If the plaintiffs were desirous of complaining of the question of 'lack of notice' as the learned Trial Court held that they were entitled to, then their remedy would be found not in a Federal Court of Equity, but only in Article 6453 of the Revised Civil Statutes of Texas, which reads:

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant."

The Supreme Court of the United States has had occasion to pass on a similar statute in the case of Southern Pacific Company v. Campbell, 230 U. S. 537, in which case Mr. Justice Hughes delivered the opinion of the Court, and held that such procedure was consistent with the due process clause guaranteed by the 14th Amendment, and in discussing the matter, the Court said:

"The provision of the Statute that suit might be brought in the State Court to set aside orders of the Commission upon the ground that the rates fixed were unlawful, or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants. The procedure permitted by the Statute is consistent with the 14th Amendment. Portland Light & R. Co. v. Railroad Commission, 229 U. S. 397, 57 Law Edition 1248."

In support of our contention that only Texas railroads affected by the challenged order are entitled to notice and that The Pullman Company was not entitled under the laws of Texas to any notice we cite the case of Railroad Commission of Texas et al. v. Houston Chamber of Commerce, et al., 19 S. W. R. (2nd) 583, affirmed by Commission of Appeals 78 S. W. R. (2nd) 591, which opinion was adopted by the Supreme Court of Texas.

#### Point No. 3

RAILROADS ARE ARTIFICIAL CREATIONS EXISTING AND LIMITED BY CHARTERS GRANTED BY THE STATE AND THE RIGHTS THUS ACQUIRED CANNOT BE DELEGATED BY CONTRACT TO A THIRD PERSON.

#### ARGUMENT AND AUTHORITIES

Article 6260 Revised Civil Statutes of Texas provides:

"No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State."

In the case at bar the Texas railroads have, according to the allegations and proof of the plaintiffs, contracted away certain of their chartered rights to The Pullman Company, a foreign corporation chartered under the laws of the State of Illinois, namely—the Sleeping Car or Pullman Car accomodations. The United States Supreme Court settled the law on this question in an early decision of *Pennsylvania R. R. Company v. St. Louis, etc. R. R. Co.* 118 U. S. 290 when it said:

"We think it may be stated . . . that, unless specially authorized by its charter, or aided by some other legislative action,

a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers . . ."

The pronouncement of the Trial Court to the effect:

"The regulation . . . is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and The Pullman Company, which it is without any statutory authority to do." (Tr. 363).

is indeed a strange and new innovation in Texas jurisprudence. Even a cursory analysis of the Court's pronouncement of the law leads to the inevitable conclusion that notwithstanding the statutes of Texas railroads may by contract place their operations beyond the reach of the Railroad Commission and delegate their original chartered rights to some foreign corporation and together share in the profits. Thus the railroads could do indirectly what they cannot do directly. The railroads could thus by contract with foreign corporations collect rates and charges they would not be allowed to collect if the railroad itself were operating the same equipment. This same reasoning would allow the

railroads to contract away the cattle cars that haul the cattle of Texas to market, without any regulation on the part of the Railroad Commission. It would allow the railroad companies by contract to delegate their chartered rights to foreign corporation for grain cars to haul the grain from the wheat fields of Texas to the market. It would allow the railroad companies to contract with another company to furnish the engines, another the freight cars, another the passenger cars, and on and on indefinitely and by this method the Railroad Commission would have no regulation whatever over the railroads or any part of the equipment used thereon. We respectfully urge that the reasoning of the Trial Court on this point is without precedent or logic and contrary to the express statutes of the State of Texas hereinabove cited in this brief.

#### Point No. 4

A COURT, IN REVIEWING THE ACTION OF AN ADMINISTRATIVE AGENCY TO WHICH THE FORMULATION AND EXECUTION OF A STATE POLICY HAS BEEN INTRUSTED, MUST NOT SUBSTITUTE ITS NOTION OF EX-PEDIENCY AND FAIRNESS FOR THOSE WHICH HAVE GUIDED SUCH AGENCIES.

#### ARGUMENT AND AUTHORITIES

An examination of the challenged order discloses that the findings of the Railroad Commission upon which the order is finally based (Tr. 39-52) set forth in detail the facts as were presented before the Commission showing that the investigation before such Commission was thorough, exhaustive and comprehensive. Based upon these findings the Commission entered the order complained of. A comparison of the Commission's findings of fact is found with that of the learned Trial Court as set forth on pages 365, 366, 367 Transcript, but the same are not as detailed, exhaustive or comprehensive as that of the Commission. It is suggested that many of the same witnesses who appeared before the Pailroad Commission likewise appeared before the Trial Court and thus substantially the same testimony was heard. Based upon such testimony the Trial Court arrived at a different conclusion to the administrative body and simply reversed the conclusions of the Railroad Commission. We submit that the position of the Trial Court is contrary to the rule as announced by Mr. Justice Frankfurter of this Court in the case of Railroad Commission v. Rowan & Nichols Cil Co., 310 U. S. 573, 84 L. Ed. 16, page 1368, wherein the Court said:

A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.

"General as these considerations may be, they are decisive of the present case. Both the District Court and the Circuit Court of Appeals appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order. For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment."

To like effect the rule in Texas has been announced in the case of *Railroad Commission* v. *Mc-Donald*, 90 SWR (2d) 581, wherein the Court announced the rule:

3

"The test is, not what the Court's independent judgment might be, but whether there was substantial evidence before the Commission to sustain its order."

It is interesting to observe that the challenged order provides:

"It is Further Ordered by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force.

"It is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce." (Tr. 54).

The testimony affirmatively disclosed that not a single one of the plaintiffs in this case have made application to the Railroad Commission of Texas seeking an exemption from the operation of the challenged order. (Tr. 128-129-265).

#### Point No. 5

THE CHALLENGED ORDER WAS A VALID EXERCISE OF THE POLICE POWER OF THE STATE AND A REASONABLE AND NECESSARY ENFORCEMENT OF THE SANITARY CODE AS APPLIED TO RAILROADS AND SLEEPING CARS.

#### ARGUMENT AND AUTHORITIES

Article 10, Section 2 of the Constitution of Texas provides:

"Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, . . . and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Article 6448 Revised Civil Statutes of Texas relating to the duties of the Railroad Commission provides that the Railroad Commission of Texas shall:

"See that all laws in this state concerning railroads are in force..."

To like effect Article 6445 Revised Civil Statutes of Texas provides:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads..."

Article 4477 Revised Civil Statutes of Texas is a statute in this state commonly known as the Public Health Sanitary Code. Rule 58 provides for the health regulations as applied to depots, coaches and sleepers. Rule 59 on ventilation and heat provides:

"Each depot, railway coach, sleeping car, interurban car and street car while in use for the accommodation of the public shall be properly ventilated, and, if necessary, heated, and a sufficient amount of heat shall be furnished in time of need so that fresh air can be supplied without causing it to become unduly uncomfortably cold; and the janitor, conductor or other person in charge shall see to it that the air is replenished with fresh air from time to time as needed to prevent the same from becoming foul, unsanitary and oppressive."

Finding 13 of the challenged order provides:

"(a) See that the Pullman cars are properly cooled or properly heated for the

reception of passengers prior to the time that the cars may be opened to receive passengers."

"(c) To regulate the temperature, both of the air-conditioning device and the heat equipment, and the Commission finds in connection with the air-conditioning that such equipment is relatively new, having been in use only a few years on the railroads in Texas; that the proper regulation thereof is a matter of grave concern to the health, comfort and convenience of the passengers on Pullman cars; that the Pullman conductor is specifically charged with the responsibility of regulating the same and that he receives special instructions in the operation of same." (Tr. 43).

Thus, it will be observed that the findings of the Commission are almost identical with the requirements of the statute relating to the Sanitary Code and it is the duty of the Railroad Commission under its police powers to enforce such regulation. It has simply attempted to do so under the challenged order.

#### Point No. 6

IN CONSIDERING WHETHER THE ORDER IS UNREASONABLE AS TO COSTS THE ENTIRE REVENUES OF THE RAILROAD SYSTEM AND THE PULLMAN SYSTEM MUST BE CONSIDERED, AND NOT MERELY THE DIRECT RETURN FROM SOME BRANCH LINE OR FROM ONE STATE.

#### ARGUMENT, AND AUTHORITIES

The witness L. M. Bradish, Assistant Comptroller of the Pullman Company testified in the trial court concerning the above question as follows:

"" And when you are including the expense of each car, then the profits, if any, over and above the expenses, you figure that on the entire system, don't you, of a railroad?

A. Of a railroad, yes, the entire system of cars.

Q. In other words, your contracts with the Missouri Pacific are not limited to earnings made in Texas, or any other State, but are taken of the entire system of the Missouri Pacific lines?

A. That is right.

Q. Well, that same thing is true of all other railroads, isn't it?

A. Yes.

Q. And this expense item, if this order goes into effect, and you say it would cost you so much money, that likewise would be spread all over the entire system of a railroad, wouldn't it?

A. Yes, it would.

Q: And would not be limited, of course, to any one State?

A. No. (Tr. 150)

This pronouncement of the law we think to be supported by the United States Supreme Court in the case of Groesbeck v. Duluth S.S. & A.R. Co., 250 U.S. 607. A general statement of the law is found in 15 A.L.R. 190 as follows:

"The weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a railroad company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be considered, and not merely the direct return from the branch line itself; in other words, the branch line is not to be considered as an independent enterprise, but rather in the nature of a feeder to the system. In addition to the authorities already cited, this doctrine finds support in the following, among possibly others, cases: ..."

#### CONCLUSION

For the reasons stated by the Attorney General and for those hereinabove stated we pray that the judgment of the trial court be reversed.

Respectfully submitted:

A. B. CULBERTSON

and

CECIL A. MORGAN

First National Bank Building Fort Worth, Texas

Counsel for Interveners

M. B. Cunningham, W. A. Worley, W. M. Hadley and Order of Sleeping Car Conductors.

By beeil G. Merga

A copy of this brief has been delivered to the following:

1. Gerald C. Mann, Esq., Attorney General of Texas, and Cecil Rotsch, Assistant Attorney General, both of Austin, Texas, Counsel for the Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, Jerry Sadler and Gerald C. Mann.

2. Ireland Graves, Esq. of Austin, Texas, counsel for the plaintiffs and the interveners

Warren J. West, Allen Harvey and Fidella H. McBey.

- 3. Claude Pollard, Esq. of Austin, Texas, counsel for the plaintiff railroad companies.
- 4. L. M. Greenlaw, Esq. of Chicago, Illinois, general counsel of the Pullman Company.
- 5. H. S. Anderson, Esq. of Chicago, Illinois, Assistant General Solicitor of the Pullman Company.

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IN THE

### Supreme Court of the United States

OCTOBER TERM, 1940

NO. 283

RAILROAD COMMISSION OF TEXAS, ET AL,

**Appellants** 

V

THE PULLMAN COMPANY, ET AL,

**Appellees** 

REPLY BRIEF FOR APPELLANTS
(Railroad Commission of Texas, Lon A. Smith,
Ernest O. Thompson, Jerry Sadler, and Gerald C. Mann)
AND FOR INTERVENING DEFENDANTS
(M. B. Cunningham, W. A. Worley, W. M. Hadley,
and Order of Sleeping Car Conductors).

Appeal from the District Court of the United States for the Western District of Texas

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Appeal from the District Court of the United States for the Western District of Texas

1. The Plaintiffs' (Appellees') Suit Has Not Been Properly Brought as a Direct Attack.

The appellees state that "the present action, challenging the Commission's order. . . . , is a direct at-

tack." (Page 58, Brief for Appellees). This statement is apparently in answer to the appellants' request that the appellees advise the court whether they are bringing a direct or collateral attack in this case. (Page 42, Brief for Appellants).

We submit that a direct attack can only be brought in the manner provided by statute, and that manner is prescribed by Article 6453, as follows:

"If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant..."

In the case of Texas Steel Company v. F. W. & D. C. Ry. Co., 120 Tex. 597, the Supreme Court of Texas held that an order of the Railroad Commission of Texas regular on its face is "not subject to be called in question except in a direct proceeding brought in full conformity with the provisions of Article 6453."

We pointed out in the Brief for Appellants, heretofore filed in this case, that in the case of *Henderson* v. *Terrell*, 24 Fed. Supp. 147, Judge Hutcheson held in a situation similar to this case that when they were

"... In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts."

As authority for the right to maintain a direct attack in the manner they seek to maintain it in this case the appellees cite the case of Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362; but, in that case there was a diversity of citizenship, and there is no such diversity in this case. In the Reagan case the court said:

"... it r ay be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of

another State may invoke the jurisdiction of the Federal courts."

In this case some of the plaintiffs are citizens of Texas, and all of the defendants are citizens, and therefore the rule in the Reagan case does not apply.

If the appellees (plaintiffs) have brought a direct attack, as they contend, in this case, then we submit that they are not entitled to an injunction enjoining the enforcement of the Railroad Commission's order for two reasons. First, the plaintiffs' (appellees') complaint does not allege that there was no substantial evidence before the Railroad Commission entitling it to pass the order in question. Second, it was not proved that there was no substantial evidence before the Railroad Commission to sustain its order.

We sincerely believe that the same error that was committed by the three-judge court in the second Rowan & Nichols Oil Company case was committed by the court in this case\*, and that is that the trial court totally ignored the findings of fact of the Railroad Commission and the evidence before the Commission. If the findings of fact of the Railroad Commission are accepted at "face value" there are sufficient grounds to justify the order in question. As far as the three-judge trial court knew, and as far as this court knows, there was ample evidence before the Railroad Commission to support the order in-

<sup>\*</sup>This case was the next case in the trial court after the Rowall & Nichols Oil Company case (reversed in 61 S. Ct. 343, 85 L. Ed. 321), and the same three-judge court tried both cases.

volved in this case. The three-judge trial court was never informed as to what amount or kind of evidence was before the Railroad Commission. We contend that for that reason the trial court is not entitled to enter a judgment holding that there was no substantial evidence before the Commission to sustain its order.

Without alleging that there was no substantial evidence to support the Commission's order, the plaintiffs (appellees) filed an independent suit asking the Federal court to determine as an original investigation from evidence before the court, and not from evidence before the Railroad Commission, whether said Federal court thought such order was wise or unwise. The plaintiffs (appellees) persuaded the trial court to ignore the evidence that had been considered by the Commission and to make its own investigation and substitute its own findings of fact. Thus, we have two separate and independent trials with wholly separate and different records of facts, two separate and diametrically opposed findings of facts, and two conflicting orders. We submit that such procedure is improper according to the Texas decisions. The Texas cases hold that "the only matter with which the courts are concerned is whether or not there was substantial evidence before the Railroad Commission to sustain its order in the premises." In the case of Humble Oil & Refining Company v. Railroad Commission of Texas, 112 S. W. (2d) 222, by the Texas Court of Civil Appeals, Third District, the court said:

"The Texas courts have consistently held that the only issue in a court review of the action of the commission in making administrative orders, rules, and regulations, is to determine whether there is any substantial evidence to support the order, rule, or regulation of the commission. It is a familiar rule of law that a jury's finding of fact is not reviewable in a direct proceeding on appeal, unless it is unsupported by evidence. The same is true of orders and findings of fact by a regulatory board or commission. The decision of such a board has at least as high standing in regard to finality as a verdict or finding of a jury. Texas Juris, Vol 3. p. 1088 et seq. Such has been the uniform holding of our courts with reference to valuations found by tax and equalizations made by the state superintendent of public schools; with regard to the granting or refusing of a permit of convenience and necessity to operate buses and trucks; and with regard to the rates of railroad companies and public utility companies. . . .

"This is in accord with the often-repeated rule that any order of the commission as to any matter within its jurisdiction shall be accepted under statutory provision as prima facie evidence of its validity. This means that when the order is challenged, the court will presume it to be valid, and will sustain it, unless the evidence clearly shows it to be unreasonable and unjust. The mere fact that the order in question may be unwise will not warrant a court in striking it down, so long as it is based on any substantial evidence. Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S. W. (2d) 935. 87 S. W. (2d) 1069,

99 A.L.R. 1107, 101 A.L.R. 1393; Rabbit Creek Oil Co. v. Shell Pet. Corp., Texas Civ. App., 66 S. W. (2d) 737; Falvey v. Simms Oil Co., Tex. Civ. App., 92 S. W. (2d) 292, and Smith County Oil & Gas Co. v. Humble Oil & Refining Co., 112 S. W. (2d) 220, decided by this court May 19, 1937, and wherein it was held, as follows: 'Under the repeated holdings of this court and of the Supreme Court, under such circumstances, the only matter with which the courts are concerned is whether or not there was substantial evidence before the Railroad Commission to sustain its order in the premises.'" (Italics ours)

The same rule was stated by this court in the case of Railroad Commission of Texas v. Rowan & Nichols Oil Company, 61 S. Ct. 343, 85 L. Ed. 321, supra, in language as follows:

. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. For its own good reasons Texas vested authority over these difficult and delicate problems in its Railroad Commission. . . . Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its own judgment. For it appears that the court below nullified the Commission's action without even having the record of the Commission before it. When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses." (Italics ours)

Thus, we see that the appellees' (plaintiffs') suit has not been properly brought as a direct attack. The appellees (plaintiffs) have brought a collateral attack in this case; but, under the rule stated in the cases of Texas Steel Co. v. F. W. & D. C. Ry. Co., 120 Tex. 597, and Railroad Commission of Texas v. Beaver Reclamation Oil Co., 132 Tex. 27, the appellees are not entitled to enjoin the order in question because "an order regular upon its face made by the Commission is not subject to collateral attack." The order in this case is clearly regular on its face.

#### 2. Rates and Fares.

The appellees deny that they are collecting more than three cents per mile from passengers. (Page 50, Brief for Appellees). However, the record shows that the regular passenger fare is two cents per mile (R. 240); and in addition to said two cents per mile a person who rides in a Pullman car must pay an extra one cent per mile and also an additional seat accommodation charge. (R. 139, 140). This makes

total of more than three cents. The witness B. H. Yorman testified:

- "Q. All right. Then, for the privilege of riding in the Pullman car the Railroad Company does charge an extra fare, you know that, don't you?
  - "A. Yes, sir.
- "Q. That is one cent a mile, isn't it, in Texas?
  - "A. I believe it is.
- "Q. Then in addition to paying that extra railroad fare to ride in the Pullman car, the Pullman Company then charges an additional fare?
- "A. They charge for their accommodations.
- "Q. Well, that is an additional charge, though, in addition to the railroad fare, and then the extra fare to ride in the Pullman?
- "A. It is an additional expense to the passengers. You can't go to the theater without paying for it, and if you ride in a Pullman car you must pay for a seat or berth; that applies on both roads and on all roads." (R. 139, 140)
- harge in excess of three cents per mile is a violation of Article 6416 of the Revised Civil Statutes of Texs. It also constitutes extortion in violation of

Article 6473 of the Revised Civil Statutes of Texas. We believe that the Railroad Commission is entitled to take jurisdiction over such matter by virtue of Article 6448 of the Revised Civil Statutes which provides that the Commission shall "correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State."

The appellees contend that the order in question is a rate order. If it is a rate order it does not attempt to change any legally established rate because the rates and charges now being made by the Pullman Company are illegal and extortionate, as pointed cut above, and they have never been authorized by the Railroad Commission.

This court in the case of Tagg Bros. & Moorhead v. United States, 280 U.S. 420, said:

"A rate order is not res judicata. Every rate order made may be superseded by another."

If it should be held that this is a rate order, it is subject to be changed by the Railroad Commission from time to time.

The contracts between the Pullman Company and the railroads provide that the profits derived from these illegal rates shall be split between the parties to the contracts. These contracts, based on these illegal excess fares, constitute the basis of the appellees' (plaintiffs') suit. Such a suit cannot be maintained.

#### 3. On the Question of Notice.

The appellees contend that the Railroad Commission did not give the proper notice before it held a hearing in-this case. The statute (Article 6449) only requires notice "before any rates shall be established." We do not believe any rates were established in this case. Therefore, we doubt that the notice statute (Article 6449) is involved. But, regardless of whether or not any rates were established, we believe that said statute would only require notice to be given to Texas Railroads, as a non-Texas corporation cannot operate a railroad legally in Texas (Article 6260), and we believe such notice was given. The Railroad Commission's order recites that notice was given. (R. 38) The order also recites that attorneys for the Pullman Company and an attorney for all "Texas railroads" appeared at the hearing (R. 38, 39); and such finding is not contested by the appellees, and therefore we submit it must be accepted as true. In the case of Falvey v. Simms Oil Co., 92 S. W. (2d) 292, by the Texas Court of Civil Appeals. Third District, the court said:

<sup>&</sup>quot;... any order of the Commission as to any matter within its jurisdiction shall be accepted under statutory provision as prima facie evi-

#### dence of its validity."

Regardless of what form of notice was sent to the Texas railroads, whether by formal citation, letter or telephone call, the fact that they appeared (which fact is not denied) prevented any injury to them because of any defectiveness in the form of the notice. They appeared, and the purpose of the notice statute was served.

The appellees seem to think that notice should have been given to everyone, including the porters. But, the law is to the contrary, according to the case of Houston Chamber of Commerce v. Railroad Commission of Texas, 19 S. W. (2d) 583, by the Texas Court of Civil. Appeals, Third District, (affirmed by the Supreme Court of Texas in 124 Tex. 375) in which the court said:

"In the hearing before the Commission, the only notice that is required is that given to the railroad companies, whose interests are affected. Shippers, localities, and others who may be affected or interested are not required to be given notice."

Another reason why no question can be raised about the notice in this case is that sufficiency of the notice cannot be questioned in a collateral attack. The appellees' (plaintiffs') suit is a collateral attack, as heretofore pointed out. In the case of *Texas Steel Company* v. F. W. & D. C. Ry. Co., 120 Tex. 597, referred to above, the court said:

"As shown by the certificate the Steel Company contends that the orders of the Railroad Commission are utterly void, because (a) made without notice to the railroads, (b) because no notice was given to the Steel Company. . . . All of these contentions are utterly untenable. . . .

"Under the plain and simple terms of article 6452 it is provided that all rates prescribed by the commission shall be conclusive as between private parties and railway companies, until found otherwise in a direct action. . . .

"Under the provision of article 6453 it is expressly provided that any party dissatisfied with any decision of the commission may attack the same by a direct proceeding or suit in Travis County, Texas, in which suit the Railroad Commission must be made a party....

"If an order of the commission regular on its face can be collaterally attacked on the ground of want of notice, or any other ground here urged, then the orders and rates of the commission could be rendered null and void in a proceeding in which the commission was never given an opportunity to be heard either on the facts or the law. Furthermore different courts might reach conflicting conclusions as to the facts involved in the same order. This demonstrates the wisdom of the statute, and the correctness of the rule here announced. The Legislature recognized in the beginning that to allow such attacks would lead to intolerable results, and foreclosed the right to do so by the statute prescribing the manner and the court in which the rules and rates of the commission can

be subjected to judicial review. . . . What we hold is that the orders here attacked are not subject to be called in question except in a direct proceeding brought in full conformity with the provisions of article 6453, supra."

#### 4. The "Full Crew Law" (Article 6380) Does Not Prevent the Railroad Commission of Texas From Passing Orders to Correct Abuses Under Articles 6445, 6448 and 6474.

The appellees seem to argue that Article 6380 of the Revised Civil Statutes of Texas, known as the "Full Crew Law," which prescribes that there must be a crew of at least four persons on a passanger train, impliedly prohibits the Railroad Commission from passing the order in question that requires a Pullman conductor on certain trains. (page 74, Brief for Appellees)

We submit that Articles 6445, 6448 and 6474 of the Revised Civil Statutes of Texas authorize the Railroad Commission "to . . . regulate . . . railroads . . . and to prevent . . . abuses in the conduct of their business."\* We have pointed out in the Brief for Appellants, heretofore filed, that the order in question is a correction of an abuse of the kind defined by the Legislature of Texas.

<sup>\*</sup>A note on the opinion of the trial court in this case (33 Fed. Supp. 675), commenting on the authority of the Railroad Commission of Texas, has been published in the Docember, 1940, issue of the TEXAS LAW REVIEW, Vol. XIX, page 86.

The "Full Crew Law" is designed to contribute to the safe operation of the physical equipment of the train, while the order in question is for the safety and protection and welfare of the passengers who pay the extra fare to ride in the Pullman cars.

The Legislature apparently believed that there should be a crew of at least four men on all passenger trains and therefore it passed the "Full Crew Law" (Article 6380); and it also believed that abuses, particularly discriminations, should be prevented, and it authorized the Railroad Commission to correct certain abuses whenever they appeared. We submit that that authority would allow the Railroad Commission to require another man on certain passenger trains, even in addition to the four prescribed by the "Full Crew Law," if such was necessary to prevent an abuse defined by the Legislature; and such was clearly necessary in this case.

The Legislature believed that in all cases there should be a minimum crew of four men on passenger trains, but it also authorized the Railroad Commission to require an additional man in certain instances, to-wit, where it was necessary to correct certain abuses, and this is one of those instances.

### 5. No Race Question is Involved in This Case.

The appellees in desperation for some tangible and logical basis to sustain the clearly erroneous de-

cision of the trial court attempt to raise the race question, no doubt in the hopes of trying to prejudice this honorable court. No other purpose could be effected by the matters set out on page 80, and elsewhere, of their brief.

The complete answer to this fallacious argument is that the order nowhere requires that the Pullman conductors be white men. The Pullman Company and the railroads are left completely free to select men or women of their own choosing as Pullman conductors. They may be of any race or color, and there is nothing in the findings of fact of the Railroad Commission even to suggest that there would necessarily follow any race discrimination. If there had been, no doubt able counsel would have posited it out to this court in forceful language. The only thing the order does require is that the Pullman cars shall be supervised by some one,—whether white or black being left entirely and exclusively to the employers.

## 6. Opportunity for Personal Observation of Witnesses by Railroad Commissioners.

In the footnote on page 16, and also on page 85, of the Brief for Appellees it is contended that great weight should be given to the findings of the threejudge Federal trial court because the judges of said court had the opportunity personally to observe the witnesses and thereby had a better opportunity to make correct findings of fact. Does not the same argument apply to the Railroad Commission hearing? Did not the Commissioners have the same opportunity to observe the witnesses? The answer is "Yes."

The Railroad Commission had a complete hearing in which, according to the order, the testimony of seventeen witnesses was heard. (R. 39) Then the three-judge Federal Court had another hearing, unconnected with the Commission's hearing, and without knowing what the seventeen witnesses testified to before the Commission, the three-judge Federal court substituted its own motion as to what constituted the facts. We submit that such procedure was improper under the rule stated in the case of Radice v. New York, 264 U. S. 292, as follows:

"The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant... Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

#### Conclusion

For the reasons stated, it is respectfully prayed

that the judgment of the District Court be reversed.

Respectfully submitted,

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Both of Fort Worth, Texas. Attorneys for Intervening Defendants (M. B. Cunningham, W. A. Worley, W. M. Hadley and Order of Sleeping Car Conductors).

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#### Supreme Court of the United States

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OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O, THOMPSON, ET AL, APPELLANTS

vs.

THE PULLMAN COMPANY, GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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# Supreme Court of the United States

OCTOBER TERM, 1940

#### No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL, APPELLANTS

vs.

THE PULLMAN COMPANY, GUY A. THOMPSON, TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, DEBTOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS

#### BRIEF FOR THE APPELLEES

This brief is filed in behalf of all appellees, the Railroads affected, The Pullman Company, and the Intervener-Porters; and is in reply to the brief for appellants, The Railroad Commission and others, and the brief of the Intervener-Conductors.

### Facts Showing Jurisdiction of the District Court— Not Challenged on Appeal

- (a) Findings of Fact.—The district court found:
- "1. The Pullman Company and a number of railway companies operating in Texas and trustees

in charge of railways operating in Texas bring this suit against the Railroad Commission of Texas, the members thereof and the Attorney General of Texas, to restrain the enforcement of a certain order made by the Commission on November 4, 1939. In issuing the order the Commission purported to act pursuant to Texas statutes, and a sum in excess of the jurisdictional amount is shown to be involved. The order is challenged on constitutional grounds. A temporary restraining order was applied for and granted, and the plaintiffs continued to press for preliminary injunction. Accordingly, a case for three judges, under Section 266 of the Judicial Code, is presented. The case has been tried on its merits by a court so organized.

"2. The complaint charged, and the proof shows, that the amount in controversy exceeds \$3,000.00, exclusive of interest and costs. Compliance with the challenged orders would devolve upon The Pullman Company an annual gross expense of approximately \$41,000.00, or an annual net expense of approximately \$36,000.00; and by virtue of certain contracts between The Pullman Company and the rail-road companies, a portion of this expense would be passed on to the railroads, but The Pullman Company would ultimately suffer a net annual expense

of approximately \$25,000.00.

"3. Upon the trial, without objection, leave was granted to three Pullman porters to intervene as plaintiffs, and to three Pullman conductors to intervene as defendants. Each of the porters receives extra compensation of \$13.50 per month if on any part of his run he acts as porter-in-charge. If the order of the Railroad Commission, complained of herein, is enforced, the intervening plaintiffs and other porters operating in Texas as porters-in-charge will lose such extra compensation; and their retirement pay will in consequence be reduced." (R. 365-366.)

- (b) Conclusions of Law.—The district court concluded:
- "1. While the challenged orders are directed in terms against the railroads, The Pullman Company is directly affected. The railroads cannot place a Pullman conductor on the Pullman cars except by requiring The Pullman Company to do so. Consequently, The Pullman Company has the requisite interest to challenge the orders. The matter in controversy as to The Pullman Company is the right to carry on its business free of the prohibition of the order. The value of such right is shown to be in excess of \$3,000.00, exclusive of interest and costs. Buck v. Gallagher, 307 U. S. 95, 100; Packard v. Banton, 264 U. S. 140, 142; Western & Atlantic R. R. Co. v. Railroad Commission of Georgia, 261 U. S. 264.
- 112 Since the order is directed in terms against the railroads and not against The Pullman Company, the only way in which The Pullman Company can obtain effective relief is by means of an injunction prohibiting enforcement of the challenged orders against the railroads. For this reason and for the further reason that the order undertakes to determine, and interferes with, the rights of The Pullman Company in its contracts with the railroads, the railroads are necessary and proper parties to this action. Rule 19, Federal Rules of Civil Procedure; Niles-Bement Co. v. Iron Moulders Union, 254 U.S. 77, 81-82; see also Troy v. Whitehead, 222 U. S. 39, 41; Ducker v. Butler, 104 Fed. (2d) 236, 238 App. D.C. 1939).
- "4. The orders of the Railroad Commission are challenged on substantial Federal constitutional grounds, and this Court has jurisdiction to determine all questions at issue, local and Federal." (R. 368.)

The foregoing findings of fact have not been challenged at all. Conclusion No. 1 as to the value of the right in controversy was formally challenged by Assignment No. 12 (R. 379), but the assigned error has not been specified, or otherwise brought forward. Conclusion No. 2 is formally assailed by the 13th specification (Appellants' Brief, p. 23) but otherwise it has not been noticed in Appellants' Brief. Misjoinder of the railroads was complained of at the trial by motions to dismiss the action. These were disposed of by the 3rd conclusion of law (unchallenged) as follows: "3. The motions to dismiss the action on the ground of misjoinder are not well taken and should be overruled. Rule 21, Federal Rules of Civil Procedure, and authorities above cited." (R. 368.)

#### STATEMENT OF THE CASE

Considering the nature of the case and the power of this Court to review the facts, we regard Appellants' Statement as inadequate. We now undertake to make an appropriate, additional statement.

# 1. Railroad Commission Orders and Findings

At the request of the Order of Sleeping Car Conductors (R. 289), and without notice or hearing, the Railroad Commission of Texas, on August 8, 1939, with certain preliminary recitals, (showing that the professed basis for the order was different (R. 33)

from the basis now espoused by appellants for the order now under review), promulgated this order:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DE-CREED that from and after the effective date of this order no sleeping car shall be operated on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (R. 34.)

The Pullman Company promptly applied to the Commission for a hearing for the purpose of showing that the Commission had no authority to issue such an order. Pursuant to the request, the Commission suspended the order and set the matter for hearing on August 31, 1939. Notice of the hearing stated that the Commission would "take up and consider the matter of operating sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in the charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (Complaint, Par. 5, R. 8; admitted in Answer, R. 65.)

The hearing was conducted by an examiner (no Commissioner present) and on November 4, 1939, the Commission issued the order complained of in this suit, amending the original order. The new order contains 29 so-called findings, followed by ad-

\*judications and decrees, including repetition of the provisions of the original order requiring a Pullman conductor on all trains carrying a sleeping car.\* (R. 54.)

In addition to those quoted in appellants' brief, the order contains the following findings not mentioned by appellants:

"(16) The Commission further finds from the evidence that the porters on Pullman cars are negro

men. (R. 46.)

"(17) The Commission further finds that if negro porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with that there is imminent danger of insults to the lady passengers on the Pullman cars and that such condition exists in the seventeen operations by the Pullman Company where they do not use conductors, as hereinabove referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination; that from the evidence of the lady passengers who testified before this Commission, the womanhood of Texas entertains a fear of serious bodily injury or personal attack from a negro man and that to subject them as passengers in Pullman cars to the service where there is only a negro porter in charge would be to such passengers, as well as all other passengers, an undue and unjust discrimination, prejudice and abuse. (R. 46.)

"(18) The Commission further finds that the disorderly conduct among passengers which sometimes occurs on Pullman cars in Texas can not properly be met or handled by a Pullman porter; that every Texan, both man and woman, resents any interfer-

<sup>\*</sup>Admittedly correct copies of the order, original and amended, notice of hearing, and the intervening orders are appended as exhibits to the complaint. (R. 33-54.)

ence or instructions from a negro man or from a negro porter, and the Commission finds that a negro porter would not attempt to and could not discipline a passenger on a car nor would he attempt to prevent any misconduct in such car and if the same should be indulged in to the humiliation of the other passengers on such car, that the same could not be prevented nor quieted by a Pullman porter, while the same could be properly handled and quieted by a Pullman conductor and therefore the same would be an abuse and an undue and unjust prejudice, discrimination and disadvantage. (R. 46-47.)

"(22) (c) The Commission finds that the experience of such passengers with the porter in charge has been unsatisfactory; that the construction of the Pullman cars is such that only little curtains protect the passengers one from another, and that there is a long aisle down the center of the Pullman cars, and the seats and berths are constructed alongside of the aisle, and each berth is separated from the other berths only by these small curtains, and that the lady passengers who occupy such expect and are entitled to the protection, care and service of a Pullman conductor while they are thus traveling, and that to deny them such protection, care and service is an unjust discrimination on the part of the railroads and the Pullman Company.

"(d) The Commission further finds that women prefer not to ride in Pullman cars unless there is a Pullman conductor in charge; that they are unwilling to subject themselves to the supervision of a negro porter and that the practice on the part of the railroad companies and that of the Pullman companies in having the porter in charge is unfair, unjust and unreasonable, so far as these women pas-

sengers are concerned.

"(e) The Commission further finds from the testimony that the mothers of small children in Texas are unwilling to permit their children to ride in Pullman cars where only negro porters are in charge; that they entertain a fear that the children would not be cared for nor protected; that the children of Texas are entitled to the comfort, convenience and service of Pullman cars and that to deny them of this service by failing to provide the necessary employees over and above that of a porter would be an unjust discrimination. (R. 49-50.)

"(27) The Commission further finds from the testimony offered that on different occasions Pullman porters while on duty proceeded to drink excessively and become intoxicated, thereby rendering themselves unable to perform the janitor work required of a Pullman porter, and certainly unable to perform the duties of a Pullman conductor. (R. 51.)

"(29) The foregoing acts and things done and performed by the railroads of Texas and the Pullman Company are unjust and unreasonable and amount to unjust and unreasonable charges for the services rendered by a colored porter alone in charge of a sleeping car. And such service is inadequate to provide for the proper comfort, safety and convenience of the passengers therein and does not meet the requirements of the traveling public and the agreement between the railroads and the Pullman Company." (R. 52.)

The above findings and others, including those appearing in Appellants' Brief (pp. 3-6), are followed in the challenged order by twelve unnumbered paragraphs, purporting to operate as "orders, judgments and decrees." The original order of August 8, 1939, (ante, p. 5) directed the railroads to do one thing only, namely, to have a Pullman conductor on every train carrying a sleeping car. The new order, now assailed, repeats this requirement in sub-

stantially the language of the old one, and it "orders, adjudges and decrees" several other things not mentioned in the first order. In this way the Commission has undertaken (a) to enforce the operating agreements between The Pullman Company and the railroads, as construed by the Commission, by requiring the railroads to compel The Pullman Company to perform the operating agreements by furnishing a Pullman conductor on each train; and (b) to amend, or abrogate in part, without specifically mentioning, the existing railroad passenger tariffs.

By statute the intrastate passenger fares are fixed at 3 cents per mile. On December 1, 1933, the railroads filed interstate tariffs reducing passenger fares in western territory to 3 cents per mile for transportation in parlor and sleeping cars and to 2 cents per mile in coaches. They obtained from the Texas Commission a conforming order. (R. 240.) The present order, without mentioning existing tariffs or orders relating to them, undertakes to abolish this differential "unless the facilities and employees and supervision of the work of employees and cleanliness of cars is provided while cars are enroute, all as provided by the terms of the respective contracts with the Pullman Company, are fully provided." (R. 52.) Elsewhere in the order the Commission finds that the way to satisfy such contract provisions is to furnish a Pullman conductor. It does this by saying in various ways that when the Pullman car is operated in charge of a colored Pullman porter alone, without a Pullman conductor, this does not constitute a compliance with the operating contracts (R. 40), and that if the sleeping car

is operated in charge of a Pullman conductor, this will constitute such compliance. (R. 52-53.) The order further decrees that unless the operating contracts are so complied with, no extra fare shall be charged by the railroads or by The Pullman Company in which the railroads will have any share. (R. 52-53.)

Thus the assailed order purportedly deals with three subjects: (a) It requires Pullman conductors on all trains carrying a sleeping car; (b) it undertakes to construe the operating contracts and to enforce them as so construed; (c) it attempts to change existing railroad passenger fare tariffs. Other "decrees" seem to be incidental. The points of argument in Appellants' Brief are confined apparently to the first subject, but the specifications of error are not so limited.

# 2. Facts Touching the Rate Features of the Challenged Order

The district court concluded: "12. The order of November 4, 1939, cannot be sustained as a rate order for several reasons: (a) It was not made after notice as required by law. Art. 6449, R. C. S. 1925, requires ten days' notice to each railroad to be affected by an order fixing rates. No notice was issued indicating that at the hearing of August 8,\* 1939, rate matters would be considered. (b) The rate features of the order are apparently predicated upon the Commission's assumed authority to construe and enforce the contracts between the rail-

<sup>\*</sup>Meaning August 31st, the only hearing date.

roads and The Pullman Company, as to which the Railroad Commission has no authority. (c) In so far as the order attempts to regulate rates charged by The Pullman Company, it is void, since the Railroad Commission of Texas has no jurisdiction over The Pullman Company and no authority to regulate Pullman rates. This question was expressly decided in the ease of The Pullman Company v. Railroad Commission, No. 1791, Equity, United States District Court, Northern District of Texas; affirmed without written opinion by Circuit Court of Appeals, Fifth Circuit (1908). Since then the statutes have been readopted in the 1911 Code and in the 1925 Code without change in that respect." (R. 370.)

The above conclusion is replied to by appellants (Error No. 6, Brief, pp. 19-20) by saying that the Commission's order recited and the Commission therein found that all parties interested in the subject-matter had been duly notified for the time and in the manner provided by law. Appellees admit, indeed, in the complaint it was alleged, that 10 days' notice of the Commission hearing was given. But this does not meet the issue. The complaint further charged, and the district court has found, that no notice was issued indicating that rate matters would be considered at the hearing. In the complaint, par. 5, it is alleged (R. 8), and in the answer admitted (2nd defense, R. 65) that Exhibit B attached to the complaint (R. 34-35) is a copy of the notice issued by the Commission. The notice says nothing about rate matters and gives no intimation that rates will he considered at the hearing. It refers to the original order known as Passenger Circular No. 164 and

bears a caption identical with that of the original order, stating that it relates to the "Safety, Care, Comfort, Convenience, Proper Accommodation and Transportation of Passengers on Pullman Cars within the State of Texas." (R. 33; 34.) It apprises interested parties that the Commission will "take up and consider the matter of operating sleeping cars on any line of railroad in the State of Texas when occupied by passengers holding the proper transportation for the accommodation of such cars, unless such cars are continuously in charge of an employee or an authorized agent of the firm or corporation owning or operating the same having the rank and position of Pullman conductor." (R. 35.)

Between the date of the hearing on August 31, 1939, and the date of the order, November 4, 1939, the Commission issued three orders, Exhibits C, D and E (R. 35, 36) postponing the effective date of the original order, reciting that such action was taken "in order to provide more time for examination of the record in the above numbered and entitled cause." Each of those orders was captioned as was the original order. When the final order was issued on November 4, 1939, the caption was enlarged, and for the first time the Commission stated in the caption that the order related (in addition to matters originally described) to "Charges, Fares . . . . and to Prevent Abuses, Unjust Discrimination and Extortion in Rates." (R. 37.)

When the railroads and The Pullman Company appeared at the hearing they did so in response to the notice, and they did not thereby enter an appearance for a rate hearing. (We make this statement in answer to Point No. 2 in the Conductors' Brief, p. 11.) The Commission has not argued the point and has in no way undertaken to challenge the District Court's finding and conclusion that the notice was not a sufficient predicate for a rate hearing.

#### 3. Facts Touching the Controlling Issues

District Court Findings Nos. 6 and 7:

- It appears without contradiction that there are seventeen routes or lines in Texas where Pullman cars, in so far as The Pullman Company is concerned, are in charge of a porter. In most cases this occurs only where the distance traversed is short, and in every instance it occurs only on those trains that, as regularly operated, carry only one Pullman car. These lines are described in Exhibit G\* attached to the Complaint. One of them, however, No. 3259, was discontinued prior to the trial. On trains carrying two or more Pullman cars a Pullman conductor accompanies the train. In all instances, however, the general control of the Pullman car or cars and passengers therein is lodged in the railroad conductor. The entire train and the railroad employees and Pullman employees are subject to the jurisdiction of the train conductor.
- "7. All of the Pullman porters in Texas are negroes who have been in the service of the company as porters for more than ten years, and those acting as porters-in-charge for longer terms, ranging from twenty years to thirty-four years of continuous service. The men serving as porters-in-charge on the lines in Texas described in Exhibit G have demonstrated that they are substantial, reliable men of good character and good intelligence. By training

<sup>\*</sup>The description in Exhibit G of the 17 lines affected by the order (R. 55-56) is admitted in the answer to be correct. (R. 16, 68.) Graphic descriptions appear in Appellees' Original Map Exhibits 19-35, incl., of hich additional photostatic copies are with the record.

and experience they are qualified and competent to discharge the duties assigned to them as porters-incharge; and the fact that they are negroes and are called porters-in-charge does not disqualify them or render them incompetent. The service rendered to passengers in the Pullman cars on the trains not accompanied by a Pullman conductor is in no way inferior to the service rendered on the trains accompanied by a Pullman conductor. The Pullman conductors and the porters-in-charge have had the same training, and they receive regularly the same instructions. There is no need of a Pullman conductor in addition to the porters-in-charge on the lines described in Exhibit G. In view of the Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7. (R. 367-368.)

Finding No. 6 is unchallenged. Appellants have formally challenged No. 7 by saying that the Court's findings therein "are contrary to the evidence and are not supported by the testimony and the evidence in this case." (Error No. 11, Appellants' Brief, pp. 22-23.) Under Appellants' Point III (Brief, p. 70), it is apparently their contention that there was substantial evidence at the trial in conflict with some. of the findings in the Court's Finding No. 7. Nowhere has the finding been assailed as being "clearly erroneous." Indeed, no attempt has been made by appellants to show, nor have they even asserted, that, giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses, the Court's Finding No. 7, or any part of it, is clearly erroneous. (Rule 52 (a) of the Rules of Civil Procedure.) No attempt has been made by appellants to show that the Court's findings are not

substantially supported. We take it that they will be accepted by this Court. Atlantic & Pacific Tea Co. vs. Grosjean, 301 U. S. 412, 420; Borden's Co. v. Ten Eyck, 297 U. S. 251, 261; Malloy v. New York Life Ins. Co., 103 Fed. (2d) 439, 443 (C.C.A. 1st, 1939), certiorari denied 308 U. S. 572.

And yet since this is an equity case, we now show affirmatively that the Findings of the Court are supported. The quoted, italicized language below is taken from Finding No. 7, and is followed by relevant statements from the record:

# Finding No. 7 Supported by Record

"All of the Pullman porters in Texas are negroes" (Champ Carry, R. 91), "who have been in the service of the company as porters for more than ten years" (Vroman, R. 127), "and those acting as porters-in-charge for longer terms, ranging from 20 years to 34 years of continuous service."-Intervener-plaintiff Allen Harvey has been in the continuous service of the company as porter for 30 years (R. 181), 20 years as porter-in-charge (R. 183-184); intervener-plaintiffs McBay and West for 20. years each (R. 190, 196); Sample, 21 years (R. 209); Sinclair, with company 33 years, as porter 30 years (R.-216), in-charge 8 years (R. 216); Palmer <sup>2</sup> 20 years (R. 220); Charley Thurmond 34 years (R. 222); Leroy Brown as porter 31 years (R. 203), 8 years on 4 lines as porter-in-charge (R. 203-205); Eli Morgan, many years as porter-in-charge in Texas on 5 different lines (R. 212-213); Noah Lane, many years, including continuous service on one line in-charge for past 9 years (R. 225).

(b) "The men serving as porters-in-charge on the lines in Texas described in Exhibit G have demonstrated that they are substantial, reliable men of good character and good intelligence." \*- They are not young men; their ages range from 51 years, Leroy Brown (R. 203), to 60 years, Sinclair (R. 215). They are married men; nearly all of them have grandchildren. All are native Texans, excepting Brown, born in Arkansas, in service of the company in Texas 31 years (R. 203). In main, they own their homes, some unencumbered, as Harvey (R. 182) and Thurmond (R. 222); and others not completely paid for, as McBay (R. 193), Sinclair (R. 216) and Palmer (R. 220). So far as inquired about, they are church members: West (R. 196), McBay (R. 191), Harvey (R. 186), Sinclair (R. 218), Lane (R. 226). With a few exceptions, they began while young men working for The Pullman Company. Those who have not worked continuously for The Pullman Company have held other responsible positions. For example, West 10 years in office building at San Antonio; 9 years in army and a

<sup>\*</sup>This finding, descriptive of men who testified at the trial, should be ascribed in part to observation of them by the Court. Their character, intelligence and competence to discharge the duties of porter-in-charge was established, not merely by their records and by what was said about them, but by their demeanor as witnesses, particularly on cross examination; not merely by what they said but by the manner of saying it and by their deportment throughout. This is implicit in the findings. Rule 52 of the Rules of Civ. Proc.; Malloy v. New York Life Ins. Co., (C.C.A. 1st, 1939), 103 Fed. (2d) 439, 443; cert. denied 308 U. S. 572.

<sup>†</sup>The porter testimony, after the first 3, was abridged, in deference to intimations from the bench. (R. 203.)

short while in San Antonio post office (R. 200-201); Palmer, army Y. M. C. A. secretary during World War (R. 220).

Great care is exercised by The Pullman Company in selecting only men of good character as porters. They are employed, not by officials at Chicago, but by the district superintendent in Texas and at New Orleans, under whose direct supervision they work (R. 87). And those deemed fit, the top rank porters, after long years of service, are promoted to the position of porter in-charge. (R. 88-89).

Further support for the above finding appears in what is stated below in connection with remaining portions of Finding No. 7, closely related to above.

(c) "By training and experience they are qualified and competent to discharge the duties assigned to them as porters-in-charge; and the fact that they are negroes and are called porters-in-charge does not disqualify them or render them incompetent. The service rendered to passengers in the Pullman cars on the trains not accompanied by a Pullman conductor is in no way inferior to the service rendered on the trains accompanied by a Pullman conductor. The Pullman conductors and the porters-incharge have had the same training, and they receive regularly the same instructions. There is no need of a Pullman conductor in addition to the porters-incharge on the lines described in Exhibit G."

The operating department of The Pullman Company is in charge of a vice president at the home office in Chicago, under whom are two assistants at Chicago. The territory is divided into six geographical zones, each in charge of a zone superintendent.

Zones are divided into districts and agencies, each in charge of a district superintendent or agent. Under them are assistants, inspectors, instructors and an organization sufficient to carry on the business. (R. 80-81.) Porters are employed by the district superintendents. (R. 87.) For example, porters on trains operating out of Dallas are employed by the superintendent at Dallas; others by the superintendents at Houston, San Antonio, Fort Worth, New Orleans and at Shreveport. (Two of the interstate trains operate out of New Orleans and Shreveport.) Vice president Carry, his assistant, B. H. Vroman, and the district superintendents at New Orleans, Dallas and Houston, and the agent at Shreveport, a former traveling inspector in Texas, testified at the trial. The company has in its employ between 9,000 and 10,000 porters. (R. 82.) As a general rule, the trains that carry several Pulman cars are accompanied by a Pullman conductor (R. 82). Where conditions of travel warrant, the company has operated Pullman cars in charge of porters, not accompanied by Pullman conductors, for 60 years or more, (R. 81, 93.) The method of operating in Texas is similar to that employed in other parts of the country (R. 81-82), and the service in Texas is equal to that elsewhere. (R. 96.) Some of the porter-in-charge operations have been in effect in Texas for 21 years, and a number of them for 15 or 20 years. (R. 93.) As elsewhere specifically shown (ante, p. the porters entrusted with the in-charge operations had previously had long service as porters. Before a porter is employed he is interviewed by the district superintendent and if he appears to be qualified he is allowed to make an application, in which he is required to account for his time for the preceding. 5 years. The district superintendent or assistant personally interviews his previous employers, and an agent personally checks up his home surroundings. If after such investigation the district superintendent approves his application it is sent to the zone superintendent for his approval. (Irwin, dist. supt. at Houston; with company 28 years; at Houston 20 years as chief clerk, 2nd assistant, 1st assistant, and supt.; R. 174-175; Carry, R. 86-87, Olney, . R. 157.) The porter is then given ten days' trial. The porters, and the conductors, are constantly supervised by the district superintendent, his assistants, agents, traveling inspectors, the yard inspectors, the safety supervisors, and the passenger traveling agents, all of whom travel the trains practically all of the time, and while so traveling it is their duty to supervise the service and make reports thereon, same as service inspectors who do nothing else. (Irwin, R. 175-176; Olney, R. 157-158). And the men on every line are inspected at stations on every trip. (Irwin, R. 178; Carry, R. 86.)

Porters Receive Same Training as Conductors

While porters perform services that are not performed by Pullman conductors, the latter have no duties that are not also performed by porters, with the single exception that porters are not placed in charge of more than one car on a train. Conductors receive no special training that is not also given to the porters-in-charge. (R. 132.) They are required to obey the same rules, except that when a Pullman

conductor is on the train he outranks the porters and has general supervision over them. (R. 186, 135, 140.) Schools of instruction or quarterly service and safety meetings are conducted by superintendents and are attended by conductors and porters jointly or in separate meetings. (R. 133-134) The instructions at all such meetings are identical for porters and conductors. (Vroman, R. 132; Irwin, R. 176-177; Cunningham, R. 283; Olney, R. 159.) Porters and conductors receive regularly identical bulletins of instructors. Conductors and porters-incharge, as distinguished from other porters, receive identical special instructions. (Olney, R. 158: Vroman, R. 140.) In addition, a superintendent or his assistant or an agent of The Pullman Company, known as a platform man, is at the station and inspects every train originating or passing through such points as San Antonio, Houston, Dallas, Fort Worth, New Orleans, Shreveport, El Paso, etc. This includes an inspection of the Pullman cars, the employees on the cars and the equipment. (Irwin, R. 178; Carry, R. 85-86; Olney, R. 159.)

The company's records have been examined for the purpose of determining whether the service rendered by the porters-in-charge is inferior or equal to the service rendered by the conductors. Vroman, assistant to vice president in charge of operations, testified: "Our reports indicate that the service is just as good on the porter-in-charge lines as it is on lines where we have the supervision of conductors." (R. 98.) The passenger receives identical service on both lines. (R. 133.) Vallett, superintendent at Dallas (30 years with company), said: "I have

found it to be equally satisfactory." (R. 179.) To the same effect is the testimony of Champ Carry, vice president. (R. 84.) Olney (32 years dist. supt., R. 156) testified: "... my experience has been that not only is the in-charge work handled as well, but then both work is done better by a man who runs in charge than a man who doesn't run in charge. He feels his responsibility." (R. 158.)

Testimony of Disinterested Members of Traveling Public

Seven disinterested witnesses, frequent Pullman travelers, familiar with the porter-in-charge service, residents of Dallas, Amarillo, Waco, Houston and San Antonio, testified that the service on porter-in-charge lines is as good as that on the conductor lines. Here, in part, is the testimony of C. A. Goeth,\* a native Texan, resident of San Antonio for 50 years, an attorney, whose family consists, among others, of a granddaughter:

"Q. Mr. Goeth, have you had occasion to travel frequently in recent years on trains and on Pullman cars?

"A. I have.

<sup>\*</sup>Mr. Goeth was the last of the members of the traveling public offered as a witness by plaintiffs. Others referred to had preceded him. At the conclusion of his testimony the Court suggested:

<sup>&</sup>quot;Judge Sibley: Is there any need of multiplying these witnesses, gentlemen? We have all ridden on Rullmans, and we know that no number of witnesses is going to change our ideas of what is going to happen, unless there might be some extraordinary circumstance.

<sup>&</sup>quot;Mr. Graves: We will defer to the Court's wishes, then, Your Honor." (R. 262.)

"Q. Have you observed the quality of service rendered by the porters on the Pullman cars?

"A. Yes, sir, I have.

"Q. Will you state whether it has been satisfactory or unsatisfactory from the standpoint of the passenger?

"A. Very satisfactory.

"Q. Do you recall whether you have ridden on Pullman cars that were in charge of a Pullman porter and where there was no conductor present? "A. Yes, sir.

"Q. Have you noticed any difference in the quality of service rendered by the Pullman Company?

'A. I have not.

"Q. To the passengers under those circumstances?

"A. I have not." (R. 260-261.)

#### On cross examination:

"Q. In the case of a trip of say eight or ten hours and you were going to place your granddaughter or your other two grandchildren on the Pullman car, would you feel better about it if that car was in charge of a Pullman conductor rather than merely of a porter?

"A. I would not have the slightest concern if it

were only in charge of a porter.

"Q. Would you depend somewhat on the train conductor in that feeling?

"A. •I would not." (R. 262.)

The testimony of other disinterested witnesses (excepting Clegg) was of like import: Caldwell (R. 161); Mitchell (R. 165); Fish (R. 167); Mærsh (R. 168); Shepardson (R. 171); Underwood (R. 202); Strickland (R. 256-257). Clegg, a young man, commended the porter service generally but had no recol-

lection of traveling on porter-in-charge lines. On cross-examination, after saying that he had never given any thought to the matter, he testified:

"Q. You would feel just a little bit safer with your family in there with a white man conductor in charge of that car rather than in charge of a man who does those menial tasks, wouldn't you?

"A. Yes, sir." (R. 260.)

In behalf of defendants: 7 ladies and 4 young men testified as members of the traveling public. Some of them did not claim to have traveled on a Pullman car, and not one spoke from experience on a porter-in-charge line. The substance of their testimony was that, if given the choice between traveling (or, as to the men, of having the female members of their family travel) on a Pullman car (or train) in charge of a negro porter or one with a porter and in charge of a Pullman conductor, they would prefer the latter. Three were married women. who said that they would "feel safer," for themselves or for their children, in a Pullman car in charge of a Pullman conductor. The others (6 of them University students) opined that women passengers would be safer in a Pullman car (or train) in charge of a conductor; and that "on excursions" the students would be less apt to obey a porter than they would a conductor. Elliott Roberts. student, said:

"Q. If your mother were going away do you feel that she would be safer if she were in charge of a Pullman conductor than she would be if only in charge of a Pullman porter? "A. Well, just from what you have said, yes, sir." (R. 348-349.)

#### Miss Matala testified:

"Q. Have you had occasion to ride on Pullman trains?

"A. Yes, sir.

"Q. Miss Matala, when you are riding on the Pullman trains do you think you are safer if there is a Pullman conductor in charge of that train than you would be if only a negro porter was in charge?" "A. Yes." (R. 344.)

Miss Muse, an associate social director at one of the dormitories for girl students at the University of Texas, testified:

"Q. Miss Muse, if you were riding in a Pullman car would you feel that you were safer if you had a conductor in charge than you would feel if you had only a porter in charge?

"A. I would.

"Q. I understand, but I am asking you this question, do you think the girls—it would be safer for their protection for them to be under the care of a conductor than it would be for them to be only under the care of a negro porter?

"A. Yes, sir, I think so with the conductor.

"Q. Miss Muse, in your travels do you remember seeing a train conductor back in the Pullman cars?

"A. I don't recall.

"Q. You seldom, if ever, see the conductor, do you?"

"A. Yes, I do." (R. 345-346.)

Bob Coquat, a University student, testified in behalf of defendants that he and his mother and sister had made an extended trip by train from San Antonio to New York and return on the Pullman, in connection with a trip to Europe. Further:

"Q. Now, Bob, do you think that your mother or your sister would be safer on a train if they were under the supervision of a Pullman conductor than they would be if they were only under the supervision of a Pullman porter?

"A. Yes, sir, I do." (R. 351.)

John Roberts, a University student, testified:

"Q. Do you think the women folks would be safer on the train if there was a Pullman conductor in charge than they would if there was only a Pullman porter?

"A. I believe so." (R. 342.)

Miss Dorman, a University student, testified that she had had occasion to ride on the Pullman cars; and,

"Q. When you were riding on the Pullman trains, do you think that you are safer if there is a conductor in charge than you are if there is only a negro porter in charge?

"A. I think so." (R. 343.)

The Court will observe that the above witnesses were not called upon to distinguish between the function of having charge of the train and of having charge of the Pullman car, under the supervision of the train conductor. Much of the questioning was of that kind. But that point aside, we

submit that such testimony is devoid of legal significance.

On cross examination Miss Hill, Assistant University Librarian, testified:

"Q. Now, you draw a distinction, do you not, between a colored man who has put in long years of experience in the employ of a company like the Pullman Company, acted as a porter and has proved to be trustworthy and faithful and a man of good character, and another man that you don't know anything about?

A. Well, I think there would be, of course, a

difference-

"Q. You would attach—pardon me—

"A. But I think that I would always feel safer if I knew there was a Pullman conductor—a white Pullman conductor on my coach. I have that feeling.

"Q. Do you mean to say that you don't thinkthere are any colored people that are faithful and

trustworthy and reliable?

"A. Not at all, no; I don't have that feeling; I think there are.

"Q. As a matter of fact, you know some of them

are, don't you, Miss Annie?

"A. Why, certainly; certainly I do." (R. 347-348.)

Testimony of Intervener Defendants, Pullman Conductors

For the defendants, appellants, the remaining testimony was supplied by two Pullman conductors, intervener-defendants, and two railroad conductors. Cunningham, vice president of the Order of Sleeping Car Conductors, has served as a Pullman conductor for 35 years and Hadley for 15 years. From their

experience they related instances of carelessness and dereliction of duty on the part of Pullman porters serving under them. Cunningham told of an occasion, 11 or 12 years ago, when he was assaulted and injured by an intoxicated porter (not a porterin-charge); the porter was arrested and afterwards convicted and imprisoned (R. 272). And of another occasion about 15 years ago, when on his train carrying extra cars crowded with cowbovs returning from a cattlemen's convention the porter was attacked and injured by some cowboys who claimed that the porter had been impudent to them. 273.) He described one occasion on which a porter had been guilty of neglect of duty because of drinking. (R. 274.) None of these infractions were by forters then or now serving in-charge. In fact, it was admitted that they were exceptional instances rather than typical. There was no testimony of any such conduct on the part of a por er serving as a porter-in-charge. The Pullman conductors admitted that as a rule porters are competent, reliable and of good character. Said Cunningham on direct examination:

"Q. In the main, do you find the Pullman porter to be pretty high-classed colored men?

'A. We.do.

"Q. But you do find these exceptions which you have outlined here?

"A. We do find exceptions, yes." (R. 276-277.)

#### On cross examination:

"Q. You, of course, draw a distinction, Mr. Cunningham, between these colored men that have good

characters and the others that do not have good characters?

"A. Oh, yes, sir; we have got plenty of porters

that are good porters, all right. (R. 282.)

"Q. You don't pretend, Mr. Cunningham, to say to the Court that conductors are all perfect, and the porters are, in the main, not perfect?

"A. No. sir.

"Q. These frailties are human frailties, are they not?

"A. Yes, sir.

"Q. And these matters that you have mentioned are matters of character, and the conductors, if they are not the right kind of men, are subject to those criticisms too.

"A. Yes, sir, we have some conductors that are not 100% perfect.

"Q. In the main, though, they are good men, are

they not?

"A. I think so.

"Q. Just as in the main the porters are good men.

'A. Yes, sir, or anyone else.

"Q. Well, now, they are better than the average, because the company makes an effort to get good men in both capacities, doesn't it?

"A. Yes, sir.

"Q. In the beginning?

"A. Yes, sir, they investigate very thoroughly to find out whether they have got good men before they employ them.

"Q. And keep on supervising them to find out.

whether they have made any mistakes?

"A. From time to time, yes, sir." (R. 290-291.)

Hadley described a number of incidents involving misbehavior of passengers and carelessness of por-

ters, and special services rendered by him to elderly and frail persons. In all such instances he seemed to be of the opinion that he was capable of rendering better service than could be rendered by a porter, but neither he nor Cunningham had any first-hand information about the way in which porters-incharge acted in similar situations.

W. L. Beamer has been a train conductor since 1907 but between 1923 and 1935 he devoted his time exclusively to his work as Chairman of the Order of Railway Conductors for the Katy lines. During that time he was not on duty as a conductor. (R. 317.) He told of an occasion when a lady; finding that she was the only passenger in a Pullman car in charge of a porter, stated that it was lonesome in the car and that she preferred to ride in the chair car, to which she moved (R. 319); and of another, in Oklahoma City, where a lady stated that she did not like to go to bed on the Pullman car when there was nobody there but a negro porter. (R. 320.) He said that as conductor he allowed the Pullman employees · to look after the Pullman cars but he recognized that the train conductor is captain of the train and he said that if anything unbecoming or any trouble arose on any part of the train, he would try to handle it. (R. 321.)

The remaining witness, Lowery, an M. K. & T. conductor, related an incident that occurred 7 or 8 months ago, reported to him by the Puliman conductor, involving misconduct of passengers, and he handled the matter at the request of the Pullman conductor. (R. 326.) While he claimed that he and the brakeman and the train porter spend most of

their time ahead of the Pullman car, he said: "En route I would go back and check with him (the Pullman porter) to see if our lists corresponded. . . . Our instructions are to check frequently to see that we are together on the number of passengers in the Pullman." (R. 334.)

He said he was lenient about enforcing the railroad rules but that he endeavored to live up to the rules in the way that the company would approve (R. 333); that he would prefer to have a Pullman conductor for the reason that he would feel less responsibility if a Pullman conductor were back there. (R. 330.) He did not testify to any fact showing incompetency of a porter-in-charge. He stated that in his opinion people in general do not have the respect for the Pullman porter that they do for the train conductor and Pullman conductor. (R. 326-327.) When called upon to relate instances indicating disrespect for porters, he stated that a porter was chased by a drunken passenger through six sleepers into the chair car where he, the conductor, was and appealed for help. He said that this same passenger had also attacked the brakeman and that the Pullman conductor and the porter had previously pulled the passenger off of the brakeman. (R. 327.)

By the standard railroad operating rules (R. 232)\* and by Texas statutes,† the brakeman or flagman is required to ride in the rear car of the train

<sup>\*</sup>The rule reads: "Passenger brakeman or flagman will, so far as practicable, ride near rear of passenger trains to observe and acknowledge signals, and may, when necessary, ride in lounge cars and observation sleepers, when it can be done without inconvenience to passengers."

<sup>†</sup>Art. 6378, R.C.S. 1925.

while the train is in motion. On each of the trains involved in this suit the single Pullman car is the rear car in the train, and the brakeman or flagman customarily rides in that car. (Harvey, R. 189; West, R. 200; Brown, R. 206.) Plaintiffs deemed it unnecessary to make further proof of this fact in view of the following suggestion from the bench at that point: "Unless the other people are going to controvert it, do you think you ought to accumulate that evidence? If they are going to controvert it, all right. You have already proved it by four witnesses." (R. 206.) The appellants at that point made no statement, but Pullman Conductors Cunningham and Hadley later said that some of the brakemen follow the rules in this respect and others do not. They did not attempt to say what happens on the porter-in-charge lires. Cunningham said that the brakeman rides at the back of the train on which he operates out of Kansas City but he said he probably rides there for the reason that it is a flat track. (R. 292.)

#### Porter and Air Conditioning

While it would seem to be a trivial point, an effort was made to show that porters are incompetent to handle air conditioning equipment. Appellant Cunningham testified:

"Q. What have you found about the porters? Have they caught on to the operation of this air conditioning very well?

"A. Some of them haven't, no.

"Q. Some of them haven't?

"A. No, seems to be all Dutch to some of them." (R. 293.)

He said further that as a rule porters like the temperature warmer than any one else. (R. 293.) On cross examination he testified:

"Q. Just what is it now that you do in respect to this air conditioning equipment on the train, that a man of ordinary intelligence and a little training can't also do?

"A. Well, there isn't anything." (R. 283.)

Vroman testified that porters and conductors receive identical instructions as to air conditioning (R. 135); and that on all trains the Pullman porter more often than the Pullman conductor actually attends to the air conditioning. (R. 136.)

Each of the Trains Affected by the Order Is a Short Train

They carry one or two, and in one instance three, day coaches or passenger coaches in addition to one Pullman car. (R. 356-357.) Traffic on the porter-in-charge lines is relatively light. For example, Line 3748, San Artonio-Corpus Christi, carries an average of 2 Pullman passengers southbound and 3 northbound. (R. 106); Line 3309, Galveston-Houston, 3 or 4 passengers (R. 217); Line 3128, Ft. Worth-Ennis, 5 or 6 passengers (R. 183); on Line 3265, San Antonio-Ft. Worth northbound and Waco-San Antonio southbound, the traffic is heavier. But it is a daytime operation (R. 108), and the train carries only two day coaches in addition to the Pullman car. (R. 357.) In any emergency the train conductor and the brakeman are of necessity more readily accessible to the passengers on any part of the train.

The train conductor is in charge of the entire train, and he alone has power to eject passengers. (Trainmaster Poole, R. 230.) The railroad company makes no distinction between Pullman passengers and coach passengers. They are all railroad passengers and are treated accordingly. (R. 232.) Rules require railroad conductor and trainmen to protect passengers from violence, actual or threatened, and from insults. (R. 230.) Conductors are required to pass through ears occupied by passengers at least once every hour. (R. 231.) Poole testified that the rules are enforced and it is his business to see that they are enforced. Otherwise, he would be replaced. (R. 232.)

"Q.' What does the railroad company do with the view of seeing to it that the rules are actually carried out?

"A. Well, there is various things that we do, depending entirely on the case. We continually make checks, that is part of my job, and several others do the same thing, to see that the rules are complied with; and if they are not, to make necessary arrangements to get them complied with.

"Q. Do you actually ride the trains for that

purpose?

A. Almost continuously." (R. 229.)

Rules referred to are standard operating rules, substantially identical on all railroads. (Poole, R. 232-233; Santa Fe Div. Supt. McKee, R. 236.)

One Pullman Employee Fills Need

As already shown (ante, pp. 20-22), there is no work to be done on these one-car lines that is not

now efficiently done by the porter-in-charge. Passengers receive same attention on these lines that they do on other lines. Cunningham on cross-examination said it takes him about 15 or 20 minutes to lift the transportation in the two cars on his regular run carrying an average of 15 to 20 passengers in the two cars (R. 287); and about 10 minutes more to complete his diagram, already started before departure. (R. 288.) On a one-car train, with half the number of passengers, he said he could complete his diagram and take up the tickets in 10 or 15 minutes. He was unable to give a clear account of what he would be doing other than sitting down after completing that process.

- "Q. How much of the time would you be sitting down in a seat?
- "A. Oh, probably I would be sitting down more than I would on a heavy car, because on a heavy car you have more duties to perform and more to look out after." (R. 288.)

Skill, Tact and Competency of Porters-in-Charge

The Court will understand that the experienced porter's talent for adapting himself to the exigencies of travel, including the handling of intoxicated passengers, will not be revealed by the record to the extent that it was made evident at the trial. Here, again, the district court's findings are to be ascribed, in part, to what the three Judges observed, and not merely to what they heard. Indeed, the findings accord with the common knowledge of all who have traveled considerably on Pullman cars. The resourcefulness of the porters is per-

haps best illustrated in the testimony of Allen Harvey, the whole of it (R. 181-189), and of Noah Lane (R. 225-228). Harvey testified in part:

"Q. Have you ever had any experience with

drunk passengers on the train?

"A. Well, I have seen them drinking, but I have never had no trouble, never did have no serious trouble, no sir.

"Q. Have you ever had an experience with a drunk passenger that you couldn't handle by your-

self?

"A. No. sir, I never did. I have always pacified them and got them to bed or got them quiet some way or another, you know.

'Q. Well, how do you go about handling that?

Do you order them around?

"A. Oh, no, sir, you couldn't do that, you know.

"Q. What?

"A. You couldn't do that and get no where with that, Judge, no, sir. You have to handle them with gloves. Even if you had a conductor he couldn't do that, just order them around, because it wouldn't go. You would sure have trouble then.

"Q. Have you ever had any experience on the train where a drunk passenger insulted another pas-

senger?

"A. No, sir, I never have, no sir." (R. 185.)

#### On cross examination:

"Q. What does it take to be trouble?

"A. Well, somebody that is interfering or wants to fight or disturbing other passengers, that is what I would call trouble.

"Q. How long has it been since you asked a man to be quiet or to change his conduct in any way?

"A. Well, to change his conduct-well, I have

had them probably in the smoker would get a little loud. They would be bothering nobody, but among themselves, three or four men, they would be a little loud, talking, and the way I would get that quiet is I would go in and ring a false bell myself and I would say, 'That man say he can't sleep,' and that is the way I would work that." (R. 187.)

Noah Lane, native Texan, age 53, resident of Dallas 35 years, has been continuously operating for 9 years on the Dallas-Austin car (Line 3259) on the M. K. & T. railroad, member of a church, total abstainer from liquor, knows most of passengers who travel between Dallas and Austin. He receives the in-charge compensation, since southbound the car sets out at Austin at 4:30 A. M. and is in his charge until 7:30 A. M., and northbound it is in his charge while waiting at the station at Austin from 11:30 P. M. to 1:00 A. M., when it is picked up by the train from San Antonio. (R. 225-226.) When asked to explain how he got along with drunk passengers, he said:

"I humor them. . . . Yes, sir, and coax them along. I get along with them all right.

"Q. Get along with them all right?

"A. Yes, sir, I have at times when they was drunk, and one occasion—it has been a good long time ago, about 13 of 14, if I make no mistake, I had a man that was drunk, and the conductor didn't want to let him on because he was drunk.

"Q. You mean the Pullman conductor?

"A. The Pullman conductor, yes, sir. I knew the man very well and I said, 'If you will let me have him', he was kinda bad, and I said, 'if you will let me handle him we will save trouble for all con-

cerned.' Well, he went along and let me alone, and I got him on the car and he wouldn't give up the tickets to the conductor and I said, 'if you will just leave him to me I will take care of him'; I said, 'I know him and I will take care of him,' but I was afraid to let him go to bed because he had two guns on, and I was afraid to let him go to bed with those guns on because he might wake up in his sleep and take a shot at somebody, just for fun in his sleep, or something, and I coaxed and begged him to let me have his guns, and put them away, and said I would keep them for him until in the morning, and after I persuaded with him for a long time 'if you will wear them I will let you have them', he said, and well, you can see my size; he was small, and the belt wouldn't go around me with the two guns on it, and I wanted to put them in my locker, and he said, 'no, you have got to wear them'. I said, 'well, they won't meet, the belt won't meet on me, that's all'. He said, 'get a string and tie it on', and so I taken a string off of a linen bag, and I made the belt meet, and fastened the guns on me that way, and he still wouldn't give his tickets up to the conductor; the conductor was Charlie Dannish,\* if I make no mistake, that was his name; Vsaid, "if you will just leave him to me I will get his tickets from him; just leave him alone and leave him to me', which he did, because he said if he had to come back in the car again, he would have some fun with him. So the conductor stayed outside and so the next morning we were going into Hillsboro and he got up, he just waked up and got up, and I met him and I says, 'Mr. Lee', I says, are you getting along all right'? He says, 'Yes, yes, fine'. I says, 'now, when you have got time I will take your tickets'. I said, 'you didn't give up your

<sup>\*</sup>This was the railroad conductor, evidently on the train that had arrived from San Antonio, on route at that time from Austin to Dallas.

tickets last night'. He said, 'didn't I?' I Says, 'No, sir'. 'I didn't, he says, 'why, I don't know why I didn't'. I says, 'you told me you had done give them to me', and then he said 'come on help me find them' and so he and I looked through his clothes and we found them in his watch-pocket in his vest and he had the Pullman and Railroad tickets, and gave them to the conductor; and, of course, from that time he was all right. You call that trouble, but I call it fun. On Friday night, I had a man here that was down here and he didn't have his clothes on, and he was unusually loud and I told him, I says, 'please, be quiet', I says, 'there is a lady here'; he used some pretty bad language and I said 'please be quiet, a lady will hear you' and he said, 'all right, I won't say any more'; and I got him to bed; I was about an hour late getting him there; of course, I was fixing to go to bed and I was about an hour late getting him in bed but I finally got him in bed and I seen that everything was all right and he was asleep and he had his pants lying down spreading out in the middle of the floor and I was afraid that his purse might drop out, so that was why I stayed up to see if he was asleep, and after he was asleep I went to bed, and the next morning he woke up and was all right and didn't know anything about it. Those are the most serious cases I have had with drunks.

"Q. Well, you have never had any trouble, then, with drunk passengers that you couldn't handle?

"A. No, sir.

"Q. Along those lines?

"A. No, sir." (R. 226-228.)

He was not cross examined. (R. 228.)

Intervener McBay testified:

"Q. How do you go about handling a drunk passenger?

"A. If a man is drunk on the car, the first thing I try to do is to get him to bed. If you can get him to bed, pretty soon he will go to sleep.

'Q. Do you give him any instructions or orders?

"A. No, sir, I don't give him any orders; I just coax him along. I give him service and try to get him to bed. If you can get him to bed, he is not into trouble.

"Q. What are your instructions in case you should have a passenger or your car that you could

not handle?

"A. I would first notify the train conductor." (R. 192.)

"Q. Have you had any trouble of any kind?

"A. No, sir; never in my life.

"Q. . Ever let a passenger make you mad?

"A. No, sir.

"Q. Suppose a passenger were to abuse you?

"A. Well, that is my job; I am supposed to take it. I am not supposed to get angry.

"Judge Allred: You mean if you get angry, you

don't let him know anything about it?

'A. I am not so easily made angry." (R. 193.)

## On cross examination:

"Q. Does the Pullman conductor ever have anything to do with disorderly passengers?

"A. You mean like a drunk man or something

like that?

"Q. Yes.

"A. The porter has that mostly to do. It is the job he has to worry with." (R. 194.)

Intervener W. J. West, after stating that he had never had any personal trouble with passengers, said that in two instances he had called on the train conductor in connection with drunk passengers and that the train conductor had handled both situations. (R. 198-199.) Further:

"Q. Have you ever had any experience on these cars where one passenger was mistreating another passenger?

"A. Well, one experience, where it would have been a mistreatment if probably I had not been right there and prevented it from being a mistreatment."

"Q. Did you have any trouble handling it?

"A. No, sir; I did not have any trouble handling it." (R. 199.) As to this he was not cross examined.

Their competency is further reflected in the testimony of Brown (R. 206-208); Morgan (R. 213); Palmer (R. 220); Sample (R. 210); Sinclair (R. 215-218); Charley Thurmond, when asked whether he thought he was qualified to handle drunk passengers, said: "Well, I can only cite my past record in handling them; from that standpoint I feel that I am." (R. 224.)

The testimony of the Pullman conductors showing a few exceptional instances (out of many years) of breaches of discipline and dereliction on the part of incompetent porters proves nothing against porters who have been competent, faithful, and whose conduct has been above reproach. The record is devoid of evidence reflecting discredit of any kind upon the porters operating in charge. There is no evidence that a porter, trusted with the responsibility of operating in charge, has ever been guilty of being in toxicated or of drinking liquor on duty. Indeed, in so far as it was inquired about, it was affirmatively

shown that the porters-in-charge are total abstainers. (R. 186, 191, 226.)

By the testimony of the 10 porters it was established that during their entire experience as porters-in-charge they had had no serious trouble with passengers, and that Pullman passengers on their cars had been adequately protected and properly served.

Appellees deemed it unnecessary to accumulate further testimony of porters, especially in view of suggestions from the bench after the Court had heard three of the porters that we should stipulate as to the others. The Court intimated that additional porter witnesses would be heard to afford the defendants the opportunity of cross examining them. (R. 203.) After nine of them had testified, opposing counsel indicated that they did not desire to cross examine further. (R. 225.)

### The Order Is Found to Be Without Rational Basis

(d) "In view of The Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7." (R. 368.)—The effect of this concluding sentence of the Court's findings is that there is no rational basis for the challenged order, since the findings made by the Court in Finding No. 7 conclusively negative the existence of any facts that would support the order. By this final statement the Court has said, in effect, that the facts as found in Finding No. 7 do not rest upon a mere preponderance of the evidence. They rest upon evidence so conclusive as to leave no room for reasonable minds to differ about it. This is equivalent to

saying that there is no conceivable state of facts by which the order can be supported.

The combined experience of the 10 porters who testified is equivalent to an experience record of the typical porter-in-charge of more than 226 manyears. Four of the 10 have a combined service record of more than 125 man-years, (Ante, p. 15). By the undisputed evidence it appears that this record of the porters-in-charge is one of faithful, competent service. The with whom the company is under contract to furnish the service are satisfied with it. No complaint is shown to have come from the members of the traveling public who have been served by the porters-incharge. The Pullman Company and the porters themselves warrantably take pride in it. Only the Pullman conductors have complained, and they have furnished no evidence reflecting discredit upon the service rendered by the porters-in-charge. The rare instances of dereliction of duty by a few of the other porters (not in charge) proves nothing. It furnishes no more ground for outlawing these top-grade porters than would occasional lapses of some of the conductors constitute valid support for a penal order forbidding the operating of the cars in charge of conductors.

#### · Summary of Argument

1. In response to Appellants' Point of Argument I (Appellants' Brief, p. 31) we will show that subdivisions (a) and (b) present questions that were not raised at or before trial; that they are unsubstantial; that factually the statement that the rail-

roads charge, or that the contracts between them and The Pullman Company require the charging of, fares in excess of the statutory maximum of 3¢ per mile is contrary to the record; is contrary to the Commission's own finding (R. 41); and that The Pullman Company is not engaging in the railroad business. As to subdivision (c) of Appellants' Point I, we will show that, jurisdiction having attached on substantial Federal questions, the issues of fact and of law, State and Federal, have been properly tried on the facts adduced at the trial. Such an attack on the order is not collateral, and the trial is not confined to a mere review of the Commission record.

2. The State Question—The challenged order cannot be sustained by referring it to any power delegated to the Commission to prevent "unjust discrimination" as defined by Article 6474. The opera-· tion of the single Pullman car trains (without a Pullman Conductor) in charge of a porter under the supervision of a train Conductor is not unjust discrimination as defined by statute. The Commission cannot supplement the definition; and the Commission has no power to prevent "unjust discrimination" by issuing the order complained of Our references, throughout, to the challenged order, unless otherwise indicated, are to the part of it that forms the basis of appellants' brief and is quoted in the district court's opinion, 33 Fed. Supp. 675 (R. 360), ante, p. 5. This prohibitory feature of the order was at first promulgated by the Commission without notice or hearing. When so issued the Commission did not pretend that it was designed to pre-

vent "unjust discrimination." On its face it professed to be a regulation designed to promote "the. safety, care, comfort, convenience, proper accommodation and transportation of passengers on Pullman . cars within the State of Texas." (R. 33.) When notice was thereafter issued for a hearing to consider whether the order would be set aside, the notice stated that the Commission would consider the above mentioned order, so entitled, and for such purposes. Nothing was said about unjust discrimination. After the hearing when the order was reissued with the same prohibitory clause (R. 53), and a great deal more, the Commission for the first time made reference to the matter of unjust discrimination. It is now sought to be upheld, but can not be sustained, upon that basis.\*

3. The Constitutional Question—The order is without rational basis, and contravenes the 14th Amendment, the due process and the equal protection clauses. Findings of the district court (Nos. 6 and 7, ante, p. 13) (the former unchallenged and the latter ineffectively challenged)

<sup>\*</sup>Whether the Commission has acted within its statutory powers is a question of State law. It has been decided by a district court of three judges. The two district judges are Texas judges, and the circuit judge, Judge Sibley, has been a United States Judge in the Fifth Circuit since 1919, District Judge from 1919 until 1931, and United States Circuit Judge since January 30, 1931. Judge McMillan is a Texas lawyer of wide experience; he appeared in this Court 20 years ago as attorney for the then largest city in the State in City of San Antonio v. San Antonio Public Service Co. 255 U. S. 547 (1921). Judge Allred, after representing the Railroad Commission for four years as Attorney General of the State, served for four years as Governor.

are supported by the facts showing: that there is no need of a Pullman conductor on the single Pullman car trains; that the required service is competently rendered by the porters acting in the capacity. of porter-in-charge under the direction of the train conductor. The trains are short trains, carrying only one sleeping car. To require the railroads to compel The Pullman Company to furnish a white Pullman conductor on such trains is an arbitrary requirement. The porters, condemned in the order as incompetent to perform this function because they are negroes and not white men, are shown to be competent-men of good character, good intelligence, and proper training. The experience of the company over a long period of years of operating these single car trains under that method has demonstrated that it is a successful and satisfactory method of operation. Porters receive extra compensation for serving in that capacity; and the order, if sustained, will deprive them of it, and hence denies to them due process and equal protection of the laws as guaranteed by the 14th Amendment. No effective effort has been made by the appellants in their brief to show that the court's findings establishing the competency of the porters to serve in that capacity are erroneous. Appellants contend that the question has been foreclosed by the Commission's findings; and that, since jurisdiction does not rest upon diversity of citizenship, the district court had no right to inquire into the facts, but had the power only to review the Commission's record for the purpose of determining whether there were any facts at the Commission hearing, or sufficient facts at that hearing, to sustain the order. Such contention being plainly erroneous, there has been no effective attack made in appellants' brief on the findings and conclusions of the district court.

Other points of argument are subordinate and incidental. The two controlling questions are those referred to under 2 and 3—that is, the one State question and the Constitutional question. Unless we are wrong on both of those questions, the judgment below must be affirmed.

Appellants have contended (Point V. Brief, p. 80) that the court below erred in granting a blanket injunction, in the face of the provision in the Commission's order authorizing interested parties to apply to the Commission for permission to "deviate" from the order. The meaning of this exemption clause was inquired about by the court at an early stage of the trial and the Commission was requested to state its position. The question was evaded. Counsel for the Commission attempted to state. his personal opinion, viewing the order in an objective sense. In view of the Commission's answer to the complaint and in view of the findings contained in the order itself, the court properly concluded that the plaintiffs were entitled to a trial. The order recites, and the court has found, that there are 17 lines in the State of Texas in which the single Pullman car is in charge of a porter without a Pullman conductor, but under the supervision of the train conductor; that all of these porters are negroes. The Commission has found in its order that it is a discrimination and an abuse to operate the trains in that way. It maintained this position at the trial

and it so contends now. It has not intimated or suggested that, so long as the trains are operated in that way, any exemption from the portion of the order above referred to will be allowed. But aside from that, the Pullman Company and the porters are adversely affected by the order and they and the railroad company involved would be entitled to complain if only one line were involved. Again, if the failure to provide a Pullman conductor amounts to "unjust discrimination" within the meaning of the penal statute now relied upon by the Commission, Art. 6474, the Commission has no power to permit. a deviation that would amount to a suspending of the penal statute. The suggestion that it might be willing to suspend the statute is tantamount to an admission that the alleged gravamen of the offense is innocuous.

#### ARGUMENT

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# A. Appellants' Point of Argument I(a) (Brief, p. 31) is devoid of merit since:

- (a) By the undisputed evidence it appears that the maximum railroad fare charged by the railroads for passengers riding in the Pullman cars is 3 cents and not 4 cents, as stated by appellants, *infra*, p. 51.
  - (b) The contracts between The Pullman Company and the railroads do not "call for charging passenger fares of more than 3 cents per mile."
  - (c) The challenged order commands the railroads to act through The Pullman Company. It requires

the railroads to effect an arrangement whereby ever train carrying a sleeping car shall be in charge of an employee or an authorized agent of the firm or corporation owning or operating the same "having the rank and position of Pullman conductor." (R. 53.)

- (d) The point was not mentioned or suggested before or at trial. Indeed, it has not been assigned as error unless it is within the purview of Error No. 2 (Brief, 18) or No. 3 (Brief, 18), not precisely this point. The points presented in Errors 2 and 3 were not seasonably raised. Plaintiffs were in no manner apprised at or before trial that they would be relied upon as a defense.
- (e) The challenged order does not proscribe existing rates on the ground that they are not authorized by a tariff approved by the Railroad Commission, as asserted in Error No. 2.
- (f) In so far as the order requires a Pullman conductor on each train carrying a sleeping car, the prescribed remedy bears no reasonable relation to the so-called evil of charging extortionate rates.
- (g) No hearing has been called or conducted by the Commission to determine whether existing rates are extortionate.
- (h) The order expressly commands the railroads to observe and perform contracts with the Pullman Company, as construed by the Commission. (R. 42, 52, 53.) Hence the order cannot be supported on the ground, presented after trial and judgment, that the contracts are illegal and void.
- (i) Error No. 3 complains of the Court's failing to sustain motions to dismiss the complaint for de-

fects said to be apparent on the face of the complaint. Such objection to the complaint was not raised in the motions or in the answer. And the complaint discloses no such vice. Nothing is quoted from the complaint or in substance stated in appellants' brief in support of the assigned error.

(j) The suit was not instituted to enforce any provision of an operating contract, or to recover damages for its breach. As stated in the Court's 1st Conclusion (R. 368), unchallenged, the action was brought to vindicate the right of the plaintiffs to carry on their business unmolested by the prohibitions imposed by the challenged order. Such rights are in no way conditioned upon any so-called illegal provisions of the contracts.

(k) The contracts contain no provision purporting to regulate railroad passenger fares; and, as to sleeping car fares, they merely provide that such fares shall be on a parity with whatever fares are

charged on a competing line. (R. 6.)

(1) While by the terms of the operating contracts the railroads, under stated conditions, are required to make payments to The Pullman Company; and in other contingencies The Pullman Company is to make payments to the railroads; it does not appear in the record that, pursuant to such provisions, the railroads have received or have been entitled to receive, any money from The Pullman Company; much less does it appear that such payments have been made or have been due by The Pullman Company to the railroads by reason of operations on the porter-in-charge lines. Nor does it appear that any railroad has collected anything from The Pullman Com-

pany arising directly or indirectly from the payment of sleeping car fares by intrastate passengers in Texas.

(m) Even if it be assumed that the railroads have received payments from The Pullman Company pursuant to the operating contracts, the assumed fact would not show that intrastate sleeping car fares paid by Texas passengers constitute railroad passenger fares within the meaning of the 3 cent fare statute.

In stating (Appellant's Brief, pp. 12, 34) that the railroads exact a railroad fare of more than 3 cents per mile for passengers riding in the Pullman cars, appellants have misconceived the record. Not only is there nothing in the record to support the assertion, but the undisputed record is to the contrary. W. J. Rogers, Chairman of the Southwestern Passengers Association, and publishing agent under power of attorney on file with the Interstate Commerce Commission, testified:

"Q. What are the maximum fares prescribed by

the Interstate Commerce Commission?

"A. For transportation in sleeping or parlor cars, three cents per mile. For transportation in coaches or chair cars in western territory, it is two cents per mile. (R. 239.)

"Q. Has permission been granted by the Interstate Commerce Commission to charge a higher fare

in sleeping cars than day coaches?

"A. The Interstate Commerce Commission, as I say, set the three cents per mile as the maximum charge for transportation in parlor and sleeping cars, and a lower charge for coaches.

"Q. And that applies with regard to interstate

business in Texas as well as any other place?

"A. Yes, sir; we voluntarily reduced the passenger fares in western territory on December 1, 1933, to three cents for transportation, parlor and sleeping cars, and two cents coaches, we went to the Railroad Commission for the necessary authority to put in the same rate in Texas, and that authority was granted us." (R. 240.)

He testified on cross examination:

"Q. Mr. Rogers, to ride in a chair car in Texas, a passenger is required to pay two cents a mile?

"A. That is the coach rate.

"Q. Then if that same passenger desires to ride on the Pullman, he is required to pay to the railroad company an additional one cent per mile?

"A. He pays three cents per mile. The differ-

ence happens to be one cent, yes, sir.

"Q. He pays three cents a mile, then?

"A. Well, in Texas, of course, the statute rate is three cents a mile. The Railroad Commission, on their own initiative, reduced the coach fare to two cents a mile." (R. 243.)

The Commission made an express finding (R. 41) in accord with the foregoing testimony, and in irreconcilable conflict with the contention now made by it.

B. The Pullman Company does not operate a railroad in Texas, and the contracts between it and the railroads do not contemplate or require such operation by it.

(In reply to Point I(b), Appellants' Brief, stated,

p. 32, argued, p. 35.)

Appellants contend that appellees' claim is based upon certain contracts and that these contracts are illegal and void because they contemplate that The Pullman Company will engage in operating a railway in the State of Texas without being incorporated as such as a Texas corporation. The Pullman Company does not operate a railroad in Texas and the contracts between it and the railroads do not contemplate or require such operation by it. The Pullman Company is a sleeping car company, distinctively taxed as such by the State.

The State of Texas in, many ways differentiates between railroad corporations and sleeping car corporations. Texas imposes an occupation tax, measured by gross receipts, on "every sleeping car company...doing business in this State...." Article 7063, R. C. S. 1925, as amended. (Appendix, p. 110.) Railroad companies, however, are required to pay an intangible tax. Articles 7098 and 7105, R. C. S. 1925, as amended (Appendix, pp. 110-111.) Railroad corporations are not subject to the gross receipts tax on their railroad operations, and sleeping car companies are not subject to the intangible tax.

The challenged order attempts to regulate the manner in which The Pullman Company may conduct its business within the State of Texas. The order obviously proceeds upon the factual assumption that the business conducted by The Pullman Company is one that it is lawfully entitled to conduct in Texas; otherwise, why tell the Company that it must conduct that business in a particular way; why attempt to subject the Company in the

conduct of its business to the standards set up in the order? It is a contradiction in terms to say that the Company must conduct its business in the manner pointed out in the order and then to say, as does the Commission by way of defending the order, that the Company has no lawful right to conduct its business in any manner within the State Moreover, the fact that the State has of Texas. subjected the Company in the conduct of its business to an occupation tax levied on those lawfully engaged in the sleeping car business establishes conclusively that the Company has the lawful right to engage in the business that is being taxed. State of Texas v. Texas Brewing Company, 106 Tex. 121, 126. The State having subjected the Company to the regulatory and tax burdens applicable to lawfully conducted businesses, the Commission cannot defeat this suit by contending that the business thus regulated and taxed is an unlawful business. somewhat similar, facing both ways attitude in respect to the conduct of a business was condemned in Smith v. Illinois Bell Telephone Company, 282 U. S. 133, 143-144.

In Pullman Palace Car Co. v. State of Texas, 64 Texas 274 (1885), the Court recognized that a rail-road company may legitimately operate its own sleeping cars and charge extra compensation therefor, in addition to the fares charged for transporting passengers. The Court said that whether such business is carried on by the railway company or by a sleeping car company, it is a distinct occupation. Such is the predicate for sustaining the occupation tax to which The Pullman Company is now sub-

jected. In the case cited the tax was avoided because the statute exempted railroad companies and thereby was held to be in contravention of the uniformity provision of the State Constitution. The exemption has been removed from the statute and the occupation is now validly taxed, without regard to whether it is pursued by a railroad company or by a separate corporation not engaged in the railroad business. The Court said:

"The business or occupation taxed under the act in question is certainly nothing more than the running of cars of a certain kind on railways for the purposes for which such cars are ordinarily used. This is the business or occupation of a railway company, in so far as it runs its own cars of the same kind on its own road for the same purposes, making a charge for the use of such cars other than is made for the ordinary transportation of passengers, on account of the increased comfort and convenience to passengers afforded by the use of such cars. A business or occupation separate and apart from its ordinary business of transporting passengers; and on this ground only can be defended the demand or receipt of any sum whatever in excess of the rate fixed by law for the transportation of passengers."\* (64 Texas 277.)

In Duval v. Pullman Palace Car Co., 62 Fed. 265 (C.C.A. 5th, 1894), plaintiffs in two consolidated cases sued The Pullman Company for damages for failing to transport them in the drawing room from

<sup>\*</sup>The passenger fare statute of 3 cents per mile, enacted in 1883, then stood as it does now. 9 Gammel's Laws, p. 376; Gen. Laws 17th Leg. (1883), p. 70. See present statute, Art. 6416, Appellants' Brief, p. 86.

Denver, Colorado, to Fort Worth, Texas. The car had been turned back by the Union Pacific Railroad at Texline because of a washout ahead. The Court held at p. 269:

"The defendant company is not liable as a carrier. It made no contract to carry. The plaintiffs had paid their fare to the railroad company, and were provided with first-class tickets entitling them to be carried from Denver to Ft. Worth by it. It was the duty of the railroad company to convey them over its line, and they were being carried by it. The defendant's sleeping car constituted a part of the carrier's train. The plaintiffs secured the privilege of riding in this car by paying an additional sum to the defendant. The obligation of the defendant, under its contract with the plaintiffs, was to accommodate them with the drawing-room in its car, constituting a part of the carrier's train, as long as the carrier would convey it. If the carrier refused to convey it beyond Texline, and turned the car back to Denver, these were not the acts of the defendant company, and they would form no basis for the complaint against it in this suit. Railroad Co. v. Roy, 102 U.S. 451."

There are no Texas decisions contra.

In Pullman Company v. Hays, et ux (Tex. Civ. App. 1924), 257 S. W. 686, the court held that The Pullman Company was not a common carrier. The case involved the theft of a passenger's personal effects and the Court held that The Pullman Company was only bound to exercise reasonable care to guard against such theft. The Court said, at page 687: "A Pullman Company is not liable as a common carrier or as an innkeeper, yet it is its duty to use

reasonable care to guard the passengers from theft, \* \* \*." In accord are Pullman Company v. Moise (Tex. Civ. App. 1916), 187 S. W. 249; M. P. R. Co. v. Groesbeck (Tex. Civ. App. 1894), 24 S. W. 702.

In 1907 the Railroad Commission attempted to prescribe Pullman fares and was enjoined by the United States District Court, which held that the Commission's statutory power to fix railroad rates does not embrace the power to fix Pullman fares. The judgment was affirmed by the Circuit Court of Appeals without written opinion. Pullman Co. v. Railroad Commission, No. 1791, Equity. United States District Court, Northern District of Texas. This is reported in the Biennial Reports of the Attorney General of Texas, 1906-1908, p. 36, infra, p. 114. The statute in this respect has not been changed (but has been re-adopted twice, Codes of 1911 and 1925) and since then the Railroad Commission has not attempted to regulate Pullman fares.

In Ft. Worth & Denver City Railway Co. v. State, 99 Texas 34, 87 S. W. 336 (1905), the Court had occasion to pass upon the relationship between The Pullman Company and the railroads under the contracts then in existence. Since then the contracts have been changed in details but the relation between The Pullman Company and the railroad companies, and their respective functions under the contracts, have undergone no substantial change. The Court in that case, on page 341, said:

"\* \* the railroad company would be benefited by the increased revenue of the other company by reduction or release from mileage, but it had no power over the charges of The Pullman Company. It is manifest that the contract did not in any way affect, or tend to affect, transportation, or charges therefor."

The significance of that decision here is that the Court again recognized the distinction between the business of operating a railroad and the business of operating a sleeping car company.

Appellants have cited the case of Philip A. Ryan Lumber Co. v. Ball, 197 S. W. 1037, and the case of Fennsylvania RR. Co. v. S. T. L. A. & T. H. R. Co., 118 U.S. 290, in support of their position. The Pennsylvania Railroad case has to do with the charter powers of railroads under the laws of Illinois and Indiana. It clearly has no application to the present case. The Ryan Lumber Company case is not in point, for under the facts stated by Appellants in their brief, the Ryan Lumber Company, a Tennessee corporation, made a contract to transport logs by railroad. The Court held that it was necessary that the Lumber Company obtain a charter under the Texas law and it not having obtained such charter, the contract for the transportation of the logs was invalid. The contracts between the railroads and The Pullman Company contain no such provision. The record in this case does not show that The Pullman Company undertakes to transport passengers, or that it has any motive power for transporting passengers, and by the express terms of the contracts between The Pullman Company and the several railroad companies, the obligation of transporting the cars is devolved exclusively upon the railroad companies (Original Exhibits 2-14).

C. The present action, challenging the Commission's order on substantial federal constitutional grounds, is a direct attack, and is cognizable in the United States courts.

(In reply to Appellants' Point I(c), Brief, stated, p. 29; argued p. 38.)

1. The attack is direct.—This attack is no less direct than was the first federal court action of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. True, that suit was held to be a combined statutory-equity action, but in both aspects the attack was direct, as it is here. If, as ruled by Judge Hutcheson in Henderson v. Terrell, 24 Fed. Supp. 147, the suit authorized by the Texas statute, Art. 6453, (grounded upon the claim that the order is "unjust and unreasonable") is not available except where jurisdiction is predicated (at least in part) on diversity of citizenship,\* the consequence is that the present action is purely equitable, and the statutory grounds above mentioned are not involved.

But, this being an action against the Commission and its members, challenging the validity of the order, and seeking to enjoin its enforcement, there is no ground for appellants' notion that the attack is a collateral one. In support of their contention appellants (Brief, p. 41) have quoted a portion of Judge Hutcheson's opinion in *Henderson v. Terrell*, 24 Fed. Supp. 147, but they failed to note the immediately succeeding portion of the opinion, answer-

<sup>\*</sup>The Court needs no suggestion from us as to whether such ruling has now been approved by this Court in Railroad Commission of Texas v. Rowan & Nichols Oil Co., No. 218, October Term, 1940, decided January 6, 1941.

ing the point against them, as follows: "Their bill, however, does sufficiently make out a case arising under the Constitution and laws of Texas of which this Court has jurisdiction, one requiring three judges." (24 Fed. Supp. 149.) See, accord: Boxrollium Oil Co. v. Smith, 4 Fed. Supp. 624 (So. D. Tex.), Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573 (s. c. below, 24 Fed. Supp. 131, and 107 Fed. (2d) 70), where diversity was absent. This is also true of the many cases, from Reagan v. Farmers' Loan & Trust. Co., 154 U. S. 362, to Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, where constitutional questions were decided, even though jurisdiction attached on the concurrent ground of diversity. Appellants' contention involves the obviously untenable proposition that the jurisdiction of the federal courts in cases arising under the Constitution is conditioned upon diversity of citizenship.

The other two cases relied upon by appellants, Texas Steel Co. v. F. W. & D. C. Ry. Co., 120 Tex. 597 (Brief, p. 39) and Railroad Commission v. Beaver Reclamation Co., 132 Tex. 27, (Brief, p. 40) are cases brought for other purposes, in which an unsuccessful effort was made to assail Commission orders incidentally and collaterally. In the former, the Steel Company sued the railroad company for overcharges in rates and for penalties. The Commission was not a party, and the court held that in such action the Commission tariffs, apparently valid, could not be assailed. In the second case, the Beaver Reclamation Company brought suit against the Commission to set aside an order of its tender board

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refusing to issue a tender as applied for. The Commission defended by interposing a general regulation which provided that tenders were available only to those holding a permit to pick up what was known as wash-in, or salvage, oil. The plaintiff had neither acquired nor applied for such permit, and had filed no suit attacking the Commission's general rule requiring the permit as a condition to the right to receive tenders. The court held that such general rule was not subject to collateral attack in the suit complaining of the refusing of the tender.

The two Texas cases are in this respect analogous to such cases as Wadley Southern v. Georgia, 235 U. S. 662; St. Louis, I. Mt. So. R. Co. v. Williams, 251 U. S. 65; and G. C. & S. F. Ry. Co. v. State, 246 U. S. 58, 62, affirming 169 S. W. 385; cases applying the familiar rule of the Wadley Southern case, where the affected railroads, having failed to invoke the aid of a court of equity in a direct attack, were held liable for penalties accruing during pendency of the actions for penalties for violating orders that on their face were valid.

In Siler v. L. & N. R. R. Co., 213 U. S. 175, as of course the Court is aware, the Kentucky Commission's general rate order, and the statute underlying it, were attacked on local and on Federal constitutional grounds. There was no diverse citizenship and jurisdiction rested alone upon the presence of a Federal question. (213 U. S. 190.) There was a typical case of a direct attack. The right to a judicial review of the Commission's order is in no wise dependent upon the existence of the Texas statute. The State district court, being a court of general equity jurisdiction, would be open, as are the

Federal courts, to test the constitutional questions and any other questions appropriately raised. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 278; L. & N. R. R. Co. v. Garrett, 231 U. S. 298, 311.

2. The ground of attack that the order is without rational basis, and therefore contravenes the 14th Amendment, is not properly tested by reviewing merely the transcript of the evidence heard by the Commission.

The above proposition is submitted in response to the contention (Appellants' Brief, p. 42, final par.) that the complaint stated no cause of action in that it did not challenge the order on the ground that it was supported by no evidence, or insufficient evidence, at the Commission hearing. The conductors so contend also. (Conductors' Brief, p. 24.)

It is true that a motion to dismiss (Motion 10, R. 62) was made on the ground stated. But the action of the Court in overruling the motion has not been assigned as error. And it will be observed that the contention is not within the Point I (c), (Brief, p. 32) under which it is advanced.

No Texas case has held that in reviewing an order of the Railroad Commission relating to railroads the trial in the State court is limited to a review of the Commission record.\*

<sup>\*</sup>We have examined the original record in a large number of Railroad Commission cases—nearly all of them relating to rate orders—and we have found no case in which the ground of attack was that the Commission's order was not "based upon substantial evidence." In every such case the Court was called upon to decide, and decided, the effect of enforcement of the order, as shown by facts adduced at the trial; and wholly without regard to what was heard by the Commission.

The review articles now relied upon by appellants (6453, 6454) as precluding consideration of evidence by the district court, as distinguished from a mere review of the Commission record, have not been so applied or construed in any case by the Supreme Court of Texas. In all such cases, whether the order of the Commission has been challenged on the statutory ground as being "unreasonable and unjust" as to plaintiff, or also on constitutional grounds, the case has been "tried and determined as other civil causes in said court."\* This is true of such cases as

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<sup>\*</sup>The Court no doubt understands that the process, whether legislative or administrative, is finally concluded in the Railroad Commission, and that the review of the Commission's orders in the Texas courts is purely judicial. Indeed, considering the separation of powers under the Texas Constitution, it could not be otherwise. Daniel, Ins. Comm'r, v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S. W. (2d) 372 (1936). For like reason the Railroad Commission cannot be given the power to enact a law, that is, to exercise a function that is purely legislative; a valid standard has to be prescribed by the legislature itself. Board of Water Engineers v. McKnight, 111 Texas 82, 229 S. W. 301, and cases cited in Consolidated Gas Corp. v. Thompson, 14 Fed. Supp. 313 (affirmed 300 U.S. 55); see, also, Railroad Commission v. H. & T. C. Ry. Co., 90 Tex. 340; State v. St. Louis Southwestern Ry. Co., 165 S. W. 491, 496; G. C. & S. F. Ry. Co. v. State, 120 S. W. 1034. In view of the limitations of the Texas Constitution and of the statutes enacted thereunder, all reviews in court of administrative or legislative agencies are purely judicial, similar to the review noted by Justice Holmes in Railroad Commission v. Duluth Street Ry. Co., 273 U. S. 625; and like that of Michigan, as recognized in Detroit and Mackinac Ry. Co. v. Commission, 235 U.S. 402. The Texas Constitution in this respect differs from State constitutions like that of Virginia (Prentis v. Atlantic Coast Line, 211 U.S. 210), and of Montana (Porter v. Investors Syndicate, 286 U.S. 461, 287 U.S. 346); and differs from what the State constitution was assumed to be in Pacific States Box Co. v. White, 296 U.S. 176, 183.

Railroad Commission v. H. & T. C. Ry. Co., 90 Tex. 340, 353, 354 (1897); Railroad Commission v. Weld & Neville, 96 Tex. 394, 403-405 (1903); G. C. & S. F. R. Co. v. Railroad Commission, 102 Tex. 338, 353 (1909); Railroad Commission v. Galveston Chamber of Commerce, 105 Tex. 101 (1912).\* At the trial of the case last cited twenty-six witnesses testified, and the trial was de novo in every sense. From such evidence the trial judge made comprehensive, judicial findings of fact, and the Supreme Court explicitly rested its conclusion upon the unassailed findings thus made. No issue was raised or decided concerning what had taken place at the Commission hearing.

If an example is needed of cases arising in the Federal courts, we refer to Reagan. v. Farmers' Loan & Trust Co., 154 U. S. 362 (1894), where the case apparently turned on the showing of confiscation under the threatened application of the rates as made in the bills of complaint, as distinguished from the insufficiency of the evidence heard by the Commission. (154 U. S. 362, 367-368, 400-413.) Since by the complaints the sufficiency of the evidence heard by the Commission was not challenged, the demurrers should have been sustained if the rule now contended for by appellants is correct.

<sup>\*</sup>In that case the court expounded the meaning of the burden of proofs tute, requiring that as a condition to setting aside the der it should be shown "by clear and satisfactory eviden e" to be unreasonable and unjust. (Art. 6658, R.C.S. 1911, Sec. 7 of original Commission Act.) This burden has been removed by the present statute, Art. 6454, R.C.S. 1925. (Infra, p. 107.)

In United Gas Co. v. Texas, 303 U.S. 123, the case was tried upon a statute imposing upon the plaintiff the burden of establishing by "clear and satisfactory evidence" that the orders complained of were unjust and unreasonable. Even so, the Court recognized (p. 132) that "the trial was essentially de novo," saying, at pp. 139-140: "The proceeding in the State court undoubtedly purported to afford an independent judicial review. As the Court of Civil Appeals said in the instant case, the trial of the issues whether the rate was unreasonable or con-- fiscatory was 'de novo.' Appellant itself recognizes that the trial 'was essentially de novo, new and full testimony being introduced as to property value, depreciation, reserve accrual, revenues, expenses, rates of return, etc."

The State courts have held that the validity of the Commission's orders is to be tested by the evidence adduced in the State trial court, and that the Commission record is not admissible "except by way of impeaching a witness." State v. St. Louis Southwestern Ry. Co., 165 S. W. 491, 499 (1914). To the same effect are: Empire Gas & Fuel Co. v. Railroad Commission, 94 S. W. (2d) 1240, 1244; Stanolind Oil & Gas Co. v. Midas Oil Co., 123 S. W. (2d) 911, 913; and Railroad Commission v. Rau, 45 S. W. (2d) 413. The case last cited was tried under the motor carrier review statute (Sec. 17, Art. 911a, Vernon's Ann. Civ. Stats.), which at that time expressly provided for a trial de novo. In consequence, the Court said:

"Similar provisions appear in R. S. arts. 6059 and 6453, giving the right of appeal to the courts from

orders of the railroad commission in other matters; and the holding has been, wherever the question has arisen, that the proceeding in the district court is a trial de novo, and not merely a review of the railroad commission's action upon the record made before the commission." (45 S. W. (2d) 415.)

The apparent conflict between that holding and the rule announced in the McDonald case (Railroad Commission of Texas v. McDonald, 90 S. W. (2d) 581, relied upon by appellants, Brief, p. 43) is explained by the circumstance that between the dates of the two decisions the motor carrier review statute was amended, expressly providing that the Commission opinion should be admissible in evidence at the trial and it was under the amended statute, Art. 911b, Sec. 14(b), that the McDonald case was decided.\*

We deem it unnecessary to accumulate the cases except to observe that in cases arising under the motor carrier statutes applicable to certificates of convenience for truck or bus carriers, the applicants are mere licensees on the highways, and the reasons for affording a more limited review are obvious.

The Commission's action here brought under judicial review is legislative in nature and not merely administrative. In reviewing administrative action, the inquiry is concerned with the facts as they existed at the time the agency acted, as distinguished from the facts existing at a later time; whereas, in testing the validity of an act of a legislative nature, the inquiry relates to the way in which the legisla-

<sup>\*</sup>The amended statute has since then been amended again, Acts of 1937, p. 651, Sec. 911b, Vernon's 1939 Supp.

tion affects the plaintiffs at the time of the trial. The nature of the inquiry therefore necessarily allows proof of facts subsequently arising—facts relating to the application of the legislative act. In all such legislation, as Judge Cardozo has said, "from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy."\* If it is invalid at all, the invalidity must be grounded upon the facts existing at the time it is assailed in court. And if the court cannot ascertain these facts, then the court cannot determine whether the order bears upon the plaintiffs in a way forbidden by the Constitution.

Even if it should be conceded that the order is properly tested by reviewing the Commission record alone, the order could not stand, since the findings clearly import that the Commission was governed by wholly untenable standards and criteria. No amount or kind of evidence would sustain an order that affirmatively exhibits, as this one does, its extra-legal purpose and its utter want of a lawful foundation. *Tagg Bros. v. United States*, 280 U. S. 420, 442 (1930).

#### II.

## There Is No Statutory Basis for the Challenged Order

(In reply to Appellants' Point II, Brief, p. 43.)

Appellants, called upon to find a statutory basis for the order "requiring that all sleeping cars be in

<sup>\*</sup>Municipal Gas Co. v. Commission, 225 N. Y. 89, 121. N. E. 772, 774 (1919).

charge of a Pullman conductor" (Appellants' Brief, p. 43), place their reliance in a combination of Articles 6445, 6448, authorizing the Commission to "correct abuses," and 6474, defining and prohibiting "unjust discrimination." Apparently they concede that, as announced in Railroad Commission v. Railway Co., 90 Tex. 340, 38 S. W. 750, the Commission has no roving discretion to define abuses. In the case cited Judge Brown\* for ahe Coura said at page 354: "What abuses can the Railroad Commission correct? We think that it must be some abuse which has been defined by the law, and that the Commission would not by this power be authorized to enact a law defining what is an abuse or a disregard of duty on the part of a railroad corporation."

Appellants say (Brief, p. 53) that the failure to provide a Pullman conductor on the single-Pullman-car trains, while such conduct rs are furnished on the longer trains carrying several Pullman cars gives an "undue or unreasonable preference or advantage to a particular person or locality," and that the order is "designed and intended" to prevent such unjust discrimination, as defined by Article 6474. If the order is so "designed and intended," why is it not limited to removing the so-called discrimination?

The gravamen of the offense of unjust discrimination is inequality—unreasonable inequality of treatment—arbitrarily preferring some among a group who occupy a common ground. The power to remove

<sup>\*</sup>Associate Justice, later Chief Justice, Brown, formerly as a member of the Texas Legislature, was the author and chief sponsor of the Railroad Commission Act.

the unjust discrimination does not include the power to say that this result shall be achieved by contributing more to those who are being disadvantaged, rather than less to those who are being preferred. This statutory limitation is implicit in the delegation.

Assuming that the furnishing of Pullman conductors on the longer trains carrying several Pullman cars, without furnishing Pullman conductors on the single-car trains, amounts to unjust discrimination, the inequality can be eradicated as effectively by taking the conductors from the longer trains as by supplying them on the shorter ones. The Commission has plainly exceeded its powers even if it be assumed that unjust discrimination is involved in the present method of operation.

The unjust discrimination statute, Article 6474 (appended, infra, p. 107), is a complete statute dealing comprehensively with the subject. The Legislature has thereby (a) prohibited; (b) defined, unjust discrimination; (c) devolved duties upon the Railroad Commission in respect of certain portions thereof; and (d) provided a penalty as a means of enforcing obedience. The acts denounced in Sections 1, 2 and 3 constitute unjust discrimination. Section 4 prescribes the penalty; Sections 2 and 3 define the Commission's duties in respect of the subject of unjust discrimination.

By Section 2 the Commission is authorized to prescribe regulations designed to facilitate and require proper handling by connecting carriers. Section 3 deals with the subject of comparative rates as between long and short hauls and confers upon the Commission the power to authorize proper differentials relating thereto, and also to authorize "group rates."

Obviously the challenged order does not, and is not claimed by appellants to, fall within Sections 2 or 3 of the statute. It is said to be within the latter portion of Section 1. As above indicated, it is significant that in respect of Section 1 no duties are imposed upon the Commission, whereas by the article specific duties are devolved as to Sections 2 and 3, and it seems plain that if the present method of operating the single Pullman car lines without a Pullman conductor is violative of Article 6474, the statute contemplates that it shall be vindicated by resorting to the penalty provision, without calling upon the Railroad Commission to adopt a definitive order.

We submit that there is no warrant for the appellants' criticism of the trial court's action (Brief, p. 64, last par.) in applying the rule announced in St. L. S. W. Ry. Co. v. State, 113 Texas 570, 261 S. W. 996. The statute there involved, Article 6670, R. C. S. 1911, was reenacted (without change other than arrangement, not here material) as Article 6474, R. C. S. 1925. The case referred to was decided on April 30, 1924, and the 1925 Code was finally passed on March 18, 1925. To such extent as the former statute was construed by the State Supreme Court, the construction was approved by the Legislature.

We have no desire to quibble, however, over the difference between a discrimination that is unjust, as is connoted by that term in its ordinary sense, and a discrimination that works an undue or unreasonable preference. In either case it is plain that the discrimination does not offend the statute unless it is unjust, and that the preference is not denounced unless it is undue or unreasonable. What the trial court decided was that such difference, if any, as is involved in leaving the Pullman conductors off the single Pullman car trains, is not an unjust discrimination within the meaning of Article 6474; and that such preference, if any, as is so involved, is not an undue or an unreasonable preference. Appellants formally challenged the Court's finding, but we submit that they have not succeeded in overturning it by resorting to the record. The trial court found:

"9. The challenged orders are not within the authority delegated to the Railroad Commission by Article 6474, Revised Civil Statutes of 1925. The operation of the sleeping car on such trains as those described in Exhibit G, in charge of a Pullman porter, subject to the supervision, direction and control of the train conductor, does not amount to unjust discrimination as defined in said statute. The Railroad Commission has no authority to add to the definition. The statute does not require that every train be made the exact duplicate of every other train. It is not unjust discrimination to adapt the service to the varying traffic conditions." (R. 369.)

The above finding is said by appellants to be erroneous in that "under the facts in this case plaintiffs have been, and are now, operating sleeping cars on some lines of railroads without said cars being in charge of Pullman conductors, and at the same

time have operated sleeping cars on other lines with said cars being in charge of a Pullman conductor and the operation of sleeping cars on different lines in different manners in such fashion constitutes a discrimination and an abuse in violation of Article 6474." (Error No. 17, Appellants' Brief, p. 26.)

The question is whether the Com. ission's action falls within the scope of its delegated powers. The action is sought to be justified by saying that to operate trains without Pullman conductors while other trains are operated with Pullman conductors amounts to discrimination within the meaning of the statute. If the presence of the conductor on one train mandatorily requires the furnishing of conductors on all trains, how can it be true that, as stated in Point V (Brief, p. 80) "possibly some of the plaintiffs were entitled to an injunction" while others were not? The test of unjust discrimination is made the difference between furnishing the conductor and not furnishing the conductor. It is said that the statutory offense is committed if the conductor is furnished in one case and is not furnished in all cases. And, yet, at the same time it is said that traffic conditions may warrant an exemption. The unjust discrimination statute is thus relied upon to sustain the mandatory provisions of the order; and then the criterion by which discrimination vel non is to be determined is repudiated as being unreliable.

The violation of a valid order of the Railroad Commission is made punishable by heavy penalties (Articles 6476, 6477, infra, p. 109). Consequently,

the applicable rule of construction is the one announced in Railroad Commission v. T. & N. O. Railroad Co., 42 S. W. (2d) 1091, 1093 (1931), writ of error refused, as follows: "... the statute under construction is not only remedial in its nature; but penal as well and must be construed with at least a reasonable degree of strictness with respect to including anything beyond the immediate scope and object of the statute, even though within the spirit, and nothing can be added to the act by inference or intendment."

The Commission has made it plain in its findings that the basis for the order is the difference between having the Pullman car in charge of a white Pullman conductor and having it in charge of a negro porter. (See Findings Nos. 16, 17, 18, 22, 27, 29, ante, pp. 6-8.) What the Commission has undertaken to do is to enact a police regulation, which it now seeks to sustain by resorting to the unjust discrimination statute. The findings upon which the order is made to rest leave no room for doubting that the Commission deems it improper in any eircumstances to have the Pullman car in charge of a negro. They undertake to condemn as an abuse the operating of a train with a Pullman car unless the car is in charge of a white Pullman conductor. These findings are in no sense conditioned upon the fact that other trains are operated with Pullman cars in charge of Pullman conductors. The findings, if true, would condemn the withdrawing of the Pullman conductors from the trains on which they now operate. And yet it is plain that by withdrawing the conductors from these trains the so-called discrimination would be completely removed.\*

Typical is the part of the Commission's Finding No. 17 that "the womanhood of Texas entertains a fear of serious bodily injury or personal attack from a negro man and that to subject them as passengers in Pullman cars to the service where there is only a negro porter in charge would be to such passengers, as well as all other passengers, an undúe and unjust discrimination, prejudice and abuse." (R. 46.) If so, the evil is not remediable by removing the discrimination the inequality of service. Within the meaning of the anti-discrimination statute it could not be an offense to place all Pullman cars on all trains in charge of the Pullman porters. But according to the finding this would still be a prejudice and an abuse, and is positively forbidden by the order.

This exposes the order for what it is, a police regulation resting upon supposed considerations of public policy. The resort to the descrimination statute is a subterfuge.

Appellees submit that to remedy such supposed evils the Legislature has committed no such discretion to the Railroad Commission. If the Commission's findings—the overwhelming record to the con-

<sup>\*</sup>Excepting the rate features (not now attempted to be sustained by appellants) the challenged order cannot be complied with by making new rate differentials, and the question whether such differentials should be allowed is not here involved. The prohibitory feature of the order, requiring the presence of a Pullman conductor on all trains, cannot be complied with by setting up rate differentials.

trary—are assumed to be true, the serious question of establishing by law the State's public policy in dealing with the problem has not been delegated to the Commission. If it has, why is the Commission driven to the untenable position of relying upon the discrimination statute? The question whether, agreeably to the Texas Constitution, such matters could be so delegated, we need not consider. The Legislature has enacted a comprehensive code of railroad laws expressing the public policy of the State, designed to promote the safe operation of railroads and the protection of passengers. It has occupied the field of legislation dealing with train crews and has not authorized the Commission to supplement the full crew law, Article 6380, R. C. S. 1925 (infra, p. 106). Other statutes are abstracted in the appendix to illustrate the policy of the State in reserving to the Legislature the exclusive power to enact police laws. (Infra, p. 111.) Particularly is this true of such delicate and important matters as attempt to deal with race questions.

Section 1 of Article 6474, the statute relied upon by appellants, is not a service requirement statute; in main, it is an anti-rebating statute. It does not compel the railroads to render identical service as between trains or to provide the same number of employees on every train. It forbids discrimination as to charges between shippers and passengers "for doing a like and contemporaneous service." And it also prohibits any railroad from giving any undue or unreasonable preference or advantage to any particular person, etc., or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage.

Appellees submit that operating a train carrying one, two or three day coaches and one Pullman car with the regular train crew and one Pullman employee does not "subject a particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage," even though other trains carrying several sleeping cars have a Pullman conductor in addition to the porter. It is not an unjust discrimination to adapt the service to the varying conditions of traffic.

If the statute requires every train to be an exact counterpart of every other train, the railroads must furnish on all trains a lounge car, a lounge car attendant, a barber and barber shop, shower baths, the most modern type of chair cars and other equipment, and identical schedules, regardless of the needs or conditions of traffic; or else furnish such conveniences on no trains. If every train must be the counterpart of every other train, neither the railroads nor the Pullman Company can improve the services by modernizing their equipment, unless at the same time they place the improved equipment and service on every train. As a practical operating problem, this would prevent improvement and would put a stop to all progress.

#### III.

The order is without rational basis, and contravenes (a) the due process clause and (b) the equal protection clause of the 14th Amendment of the United States Constitution.

(In reply to Appellants' Point III, Brief, p. 70.)

The concluding statement in the district court's Finding No. 7 (ante, p. 14) has not been effectively challenged. The Court said: "In view of the Pullman Company's experience, extending over a long period of years, there is no reasonable basis for a finding contrary to the facts stated in this Finding No. 7." (R. 368.) The Court's Finding No. 7 and the order outlawing the porters-in-charge are utterly irreconcilable. Unless the Court's findings should be overturned, the conclusion is inescapable that the Commission's order is without rational basis. If so, the order contravenes the due process clause of the 14th Amendment as to the original plaintiffs, The Pullman Company in particular, and the equal protection and due process clauses as to the intervening plaintiffs, the porters. Since the two points are supported by a common group of facts, to separate them completely in argument would involve repetition.

A. From the standpoint of The Pullman Company and the railroads, the order represents arbitrary action, in that, as found by the district court, there is no need of an additional employee of The Pullman Company on the single Pullman car lines. The facts in support of the court's Finding No. 7 to that effect are fully set forth, ante, pp. 20, 22, 33-34.

The contention that the order may be sustained on the assumption that the Pullman porter, being a negro, is incapable of successfully policing the car, is also devoid of merit.

The railroads and The Pullman Company recognize that in so far as the duty devolves upon the employes of the train to furnish reasonable protection the responsibility is primarily that of the railroad company. If the railroad company has the responsibility, some choice must be left with that company as to how it shall be discharged. Assuming that the legislature may prescribe certain minimum requirements looking to the performance of the company's duties in that respect (as, for example, requiring a minimum train crew, including a conductor or head official), this is far from saying that the Commission may supplement these provisions by compelling the railroad company to place one of the cars on the train in charge of an employee, not of the railroad company, but of The Pullman Company.

If the train is not being properly policed, and additional regulations are needed, then, if the responsibility is to be left with the railroad company, the most that the Commission could do (assuming delegated power to prescribe reasonable and appropriate regulations) would be to require the railroad company to conform to proper standards or, if need be, to furnish an additional employee on the train for the purpose.

The Commission's order is sought now to be sustained on an entirely different theory. Appellants seek to uphold it as an exercise by the Commission of the power to prevent "unjust dis-

crimination," as defined by statute. Nowhere is it contended in the appellants' argument that the Commission has the power to supplement the Full Crew Statute by requiring the railroads to furnish additional members of the train crew on these shorter trains, in the interest of the safety of the passengers. And yet that this is what the Commission has professed to do is plainly shown by the various findings in the order itself. The invalidity of the order is exposed by the Commission's effort to legislate in a field and for a purpose not within the scope of the Commission's powers. short, we believe that the orders in question are unreasonable and void as to plaintiffs because issued in the attempted exercise, not of delegated, but of usurped powers." McMillan v. Railroad Commission, 51 Fed. (2d) 400, 405, per Judge Hutcheson for district court.

Indeed, the order as a whole exhibits its own infirmities. Its very professions condemn it as being beyond the reach of the Commission's legitimate powers. The self-interpretation contained in the order reveals the purpose of the Commission to accomplish that which is forbidden. Although avowedly issued to prevent unjust discrimination, it is also confessedly issued for other purposes beyond the scope of the Commission's powers. Such professions reveal not only the illegal purposes but the necessarily illegal effect and operation of the order. Brimmer v. Rebman, 138 U. S. 78, 83-84 (1891; unanimous opinion by Justice Harlan).

"Any pretense or masquerading will be disregarded, and the true purpose of a statute ascer-

tained." Smith v. St. L. S. W. Ry. Co., 181 U. S. 248, 257 (1900), citing Chy Lung v. Freeman, 92 U. S. 275, and the leading case of Henderson v. Mayor of New York, 92 U. S. 259. The order "will not be saved by name or form." Mr. Justice Holmes in G. H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, 227.

In principle, the rule was applied in Minnesota v. Barber, 136 U.S. 313, as is shown by the statement made in the full paragraph on page 328 in the unanimous opinion by Mr. Justice Harlan. Similar reasoning was employed to expose the invalidity of the order of the Interstate Commerce Commission that was condemned by the Court in the unanimous opinion of Chief Justice White in Southern Pacific. Co. v. Interstate Commerce Commission, 219 U.S. 433. There, it was made plain that an order emanating professedly from the Commission's rate making authority was not actually exerted for that purpose. The Court held that the nature and character of the order was such that, although on its face it appeared to be a rate order, the power actually exerted by the Commission was not a rate making power. Inshort, while it pretended to be, it was not, a bona fide rate order. The Court said that, although portions of the record indicated that rate matters had been considered, "we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences

which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future." (At p. 449.)

The Court will observe that it is not the purpose of this order to require a Pullman conductor to remain constantly on every Pullman car in the train. It is the purpose of the order to require one Pullman conductor on the train, regardless of the number of cars. Reference in the order to the 17 runs affected by the order makes this plain. The record shows without dispute that the longer trains, carrying as many as 8 Pullman cars (R. 143, 284), are commonly operated with one Pullman conductor. The order presupposes that such service is satisfactory. The order would leave one conductor on the heavy, 8 Pullman car trains, and would require one on the light, single Pullman car trains; whereas the court has found, and the facts show, that one employe is all that is needed on the latter.

B. If it be supposed that the legislature has the power of prescribing the number and qualifications of employees on a railroad train, neither the Legislature nor its agent can forbid the Company to employ a man on account of his race. It is obvious that in a constitutional sense the fitness of the porters to have charge of the Pullman car, under the supervision of the railroad conductor, is conclusively determined by considerations wholly apart from race. If in point of training, intelligence, and character the man satisfies reasonable standards, the fact that his race does not render him ineligible has been con-

clusively determined by the 14th Amendment, any finding by the legislature or its agent to the contrary notwithstanding. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

· The arbitrary effect of the Commission's order is direct and unavoidable: Interpreting the holding of the Court in Yick Wo v. Hopkins, a great jurist has said that "There the vice in the ordinance was not 'the consequence of adventitious circumstances.' People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 58, 129 N. E. 202. Its prohibitions had been cunningly framed to reach a single class. Discrimination was its very purpose. No process that was valid could ever be issued under it." So here the order has been "framed to reach a single class," but the prohibition of the class, instead of being cunningly hidden, lies plainly exposed on the face of the order, its findings included. This order says, not merely in its implications, but in words, that the negroes are not equal to the whites and that, in consequence, they are not entitled to receive equal treatment. Being legislative in its effect, the order stands condemned by the 14th Amendment.

The concluding paragraphs of the Commission's order (R. 52-53) do not in so many words prescribe that the Pullman conductor called for must be a white man, but the recitals in the order make it entirely clear that the supposed evils to be corrected consist in permitting a negro to perform work other than what the Commission terms janitor service on the car. The order must be construed and inter-

<sup>\*</sup>Judge Cardozo, concurring opinion in *People v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 367 (1921).

preted in its entirety, and when so construed there can remain no doubt that the meaning and intent of the order is to require that every train carrying a Pullman car shall be accompanied by a white Pullman conductor.

Consequently, if the order should be allowed to stand, the railroads and the Pullman Company would be compelled either to add the Pullman conductors or to withdraw the one-car lines from service. The former would involve a heavy annual expense, \$5,000.00 of which would be contributed by the porters-in-charge in the form of the extra pay now allowed them for service in that capacity (R. 145-146). And in the latter alternative a large number of porters, and other equipment service employees, would be thrown out of employment entirely. (R. 137.) And this is to befall the porters, not in consequence of their want of character, training, or intelligence as individuals, but because they are negroes and not white men.

Experience has removed the question from the realm of debate: The assumption by the Commission that a white Pullman conductor is indispensable to maintaining order or keeping the peace in the Pullman car is overthrown by the facts. The test is different from what it would have been 50 years ago. Even if it be assumed that then a regulation of this kind would have been supportable, resting upon prophecy and speculation as to what might happen, such assumption is not allowable now when prophecy has been supplanted by experience. Events always control and override

predictions where the two are in conflict. In Chastleton Corp. v. Sinclair, 264 U.S. 543, 547, Mr. Justice Holmes said: "And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events." See, accord; Municipal Gas Co. v. Commission, 225 N. Y. 89, 121 N. E. 772 (1919) - unanimous opinion by Judge Cardozo; Van Dyke v. Geary, 244 U. S. 39, 48 (1917), per Justice Brandeis; Los Angeles Gas, etc. Co. v. Railroad Commission, 289 U. S. 287, 305; Consolidated Water Co. of Utica v. Maltbie, 3 N. Y. S. 799, 167 Misc. 269. Here, the record without dispute supports the findings of the District Court that the experience of the company in operating according to this method for more than 50 years in the United States and for more than 20 years in Texas, and in other places in the South (e.g., on trains running in and out of New Orleans) for approximately 25 years, renders it unnecessary to rely upon speculation. The experimental period is over, and we now know that the so-called dangers incident to this method of operating are imagined and not substantial.

The rule announced by this Court, per Mr. Justice Cardozo, in West Ohio Gas Co. v. Commission, 294 U. S. 79, 82, is apposite:

"We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.' Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151, 164. We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

As suggested from the bench during the trial (R. 262), the facts relevant to traveling in Pullman cars in this country are generally known, and consequently we take it that they are within judicial cognizance. If it be argued, however, that, contrary to the record and the findings of the District Court, conditions are peculiar in Texas, calling for some kind of special treatment, we submit that the Court would not be warranted in overturning the findings of the local judges who heard the evidence and had the responsibility of determining the credibility of the witnesses.

U. S. 358, 365, Mr. Justice Holmes observed "the propriety of deferring a good deal to the trilunals on the spot" in determining the validity of police regulations challenged as being unreasonable or arbitrary. This is true for the reasons stated by Mr. Justice Brandeis, in Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405, 433: "When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight. Compare Welch v. Swasey,

214 U. S. 91, 105, 106; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365."

The local judges not only have the advantage of interpreting the evidence in the light of the domestic background but in a case of this kind this is of less importance than is their superior opportunity of weighing the evidence—of determining credibility. See cases cited, ante, page 15.

The statements of the disinterested witnesses who testified for the defendants (appellants) to the effect that they would prefer to have a Pullman conductor (ante, p. 23) or that they would feel safer with a Pullman conductor, and the statement of one of the ladies that she would not permit her children to ride and would herself prefer not to ride on a Pullman car without a white conductor (R. 335-336), proved nothing in a legal sense. Such whims, and expressions of personal preferences and casual opinions furnish no legal support for the order. "That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more." Atlantic Coast Line v. Wharton, 207 U. S. 328, 335.

The district court has found (ante, p. 13), and the facts, without dispute, support the finding, that the porters-in-charge as a group, including the intervener-plaintiffs, are competent and that they have rendered satisfactory service over a long term of years. (Ante, pp. 15-22.)

The fancied objections to the porters as contained in the findings incorporated in the challenged order are ascribed to them as a class because of their color.

The fact inquiry involved in the legislative determination that race or color renders them incompetent for the positions now held by them has been . settled the other way by the 14th Amendment. The legislative process has to proceed on that basis as an accepted fact. The vice inhering in this order is not essentially different from the one that worked condemnation of the ordinance in Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 240. There it was said that the operation of the ordinance would in its enforcement prevent all colored men, diseased or not, from serving white children as barbers. Here the operation of the order would in its enforcement prevent all of the porters, competent or not, from serving as porters-in-charge. See the apposite case of Alston v. School Board of City of Norfolk, 112 Fed. (2d) 992 (C.C.A. 4th, 1940); certiorari denied Oct. 28, 1940, No. 429; and cases there cited. See also People v. Ringe, 197 N. Y. 143, 90 N. E. 451, The order ignores the "righteous distinction 454. between guilt and innocence." It is arbitrary and illegal because it imposes its burden "where the evils are absent as where they are present." Tyson v. Banton, 273 U.S. 418, 443.

We submit that the order is without rational basis; and that it contravenes the due process and the equal protection clauses of the 14th Amendment.

The order is not rendered invulnerable by the arbitrary provision stating that, upon application, "deviation" from its terms might be allowed, on undisclosed conditions, if the Commission should see fit to do so.

(Answer to Point V, Appellants' Brief, p. 80.)

1. If such "deviation" should be permitted, for example, as to 16 lines, and refused as to the one remaining line, The Pullman Company, the interveners and the railroad company thus affected would still be entitled to maintain the action. Essentially, The Pullman Company and the porters-in-charge are the parties most vitally affected. Since it is not suggested that "deviations" would in any circumstances be allowed as to all lines, the necessity for the present action is unavoidable.

In the argument in Appellants' Brief (p. 82) they say that the question whether "deviation" from the order should be allowed is determinable by traffic conditions, which vary as to each of the 17-lines. But they took the opposite position in their answer to the complaint. Plaintiffs alleged that the absence of Pullman conductors on the 17 lines was warranted by the difference in the demands of traffic as between those lines and the heavier trains carrying several Pullman cars. (Complaint, Par. 25, R. 21-22.) Replying, defendants specifically denied that "the need for a Pullman conductor on a given train is determined by operating conditions affecting that train, including the volume of traffic, the length

of the train with the consequent demands upon the time and services of the railroad and Pullman employees, ...." (R. 69-70). And that "In this connection defendants show that other factors than those mentioned in said paragraph enter into the need of a Pullman conductor ...." (R. 70). The "other factors" were not in that connection stated, but we may assume that they were stated in the findings (quoted in part immediately below) contained in the challenged order—the factors that, as viewed by the Commission, rendered the porters incompetent to have charge of the cars in any circumstances.

2. The order has been twice entered: first, without a hearing and, again, after hearing. Following the hearing the Commission found:

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"(8) \* \* there are seventeen separate and distinct operations on the various railroads in Texas without pullman conductors in charge of pullman cars. The Commission further finds that all other runs other than the seventeen operations disclosed by the evidence, do have a pullman conductor in charge of the pullman cars; that the failure to have Pullman conductors on the seventeen operations is a discrimination against the passengers who ride on those particular runs in that all other operations of Pullman cars do have Pullman conductors; \* \* \* (R. 41-42).

"(16) The Commission further finds from the evidence that the porters on Pullman cars are negro

"(17) \* \* if negro porters are placed in charge of the Pullman cars when the service of a conductor is dispensed with that there is imminent danger of insults to the lady passengers on the Pullman

cars and that such condition exists in the seventeen operations by the Pullman Company where they do not use conductors, as hereinabove referred to, and that the same constitutes an abuse and an undue and unjust disadvantage and discrimination; ..." (R. 46).

At the time of trial there were 17 runs on which the single line Pullman car is in charge of a Pullman conductor. They are the identical lines that were involved at the Commission hearing and referred to in the Commission's findings, except that (a) at the time of the trial, Line 3010, the train from New Orleans, Louisiana, to Oakland, California, was being operated in charge of a porter between Sweetwater and Texico, on the Panhandle and Santa Fe Railway Co. (R. 56); at the time of the Commission hearing and also at the time of the trial, the Pullman car on this train was also being operated in charge of a porter between Houston and New Orleans (in Texas between Houston and Sabine River—See Line 3010, R. 55); (b) at the time of the trial, Line 3106 (last "Line," R. 56) was a porter-in-charge line, between Amarillo and Denver, but at the precise time of the Commission hearing this line was in charge of a Pullman conductor, since at that season, in consequence of the summer tourist travel between Texas and Colorado, additional sleeping cars were carried on the train. a matter of fact, however, this line has been seasonally operated in this fashion for a number of years: that is, in the winter months one of the Pullman cars is dropped off at Amarillo and the conductor remains with that car while the other car proceeds to Denver with the porter in charge. It

is not claimed that there is anything distinctive about this line or Line 3010 that would entitle them to peculiar treatment as distinguished from the other 15 lines. And if they were out, the case would still be here as to the others. (c) After the Commission hearing and before the trial, Line 3258 (bottom of R. 55) had been discontinued; that is, the Pullman car had been withdrawn from service. (R. 114.)

The trial began on February 17, 1940, a Saturday. At noon a recess was taken, and the trial resumed on Monday morning, February 19, 1940. (R. 127.) On the convening of court on Monday morning, the court asked for an interpretation of the provision of the order above referred to, with the view of determining whether court action was at that time required. (R. 127-131.) Appellees stated that they had been to the Commission in respect of each of the lines excepting two of them and that they regarded the provision of the order as being but an additional arbitrary feature. This colloquy took place:

"Judge Sibley: They were separately presented to the Commission?

"Mr. Graves: Yes, sir, every one except the two

that have been inaugurated since the hearing.

"Judge Sibley: You say about one or two of these runs, that they don't involve anything but interstate passengers. Was all of that before the Commission?

"Mr. Graves: Yes, sir.

"Judge McMillan: Did they make any order?

"Mr. Graves: No, sir. Exhibit F is a new order they made after the hearing, and it contains the broad, sweeping, prohibitory provision in the exact language of the original order they entered with-

out notice or hearing.

"Judge Sibley: And then added this opportunity to come back to the Commission? Is that a single charter car or something?

"Mr. Graves: I don't know, Your Honor. (R.

129.)

"Mr. Graves: These are all of the porter in charge operations in the State of Texas, and we would still

be here with this very bill.

"Judge Sibley: Well, if they mean business, if they have considered this thing and made their decision there isn't any reason to go over it again. I was just asking if they had done that.

"Mr. Graves: Yes, sir, they have considered all of them except the two runs inaugurated since then.

"Judge Sibley: Judge McMillan wants to put it to you pretty pointedly. He wants to ask you straight off the bat that as representatives of the Commission whether the Commission regards these matters as open or whether they regard them settled?" (R. 130.) (This was addressed to counsel for the Commission.)

In response, counsel for the Commission, instead of answering the Court's question, undertook to view the order objectively and, so viewing it, said:

"If the Court please, about the only way we can answer that is in this way, that looking at this order and considering it in the light of the testimony that was given before the Commission, which we have read, it doesn't seem to me that the order is necessarily intended to preclude each and every line of operation in the State of Texas . . . ," (R. 130).

Counsel for the Commission then undertook to state in general what was before the Commission in the form of evidence and as to questions considered,—a very general statement. (R. 130.) Judge Sibley then inquired:

"Now, in finding five they say there are seventeen lines run at present without a conductor, and that the passengers on them pay the same amount and don't get the same service, and they find that there is a discrimination there. That looks like they passed on it.

"Mr. Lewis (counsel for the Commission): Yes,

Your Honor, that paragraph does, all right."

In view of the statements that had been made by counsel as to what had transpired at the Commission hearing we offered in evidence the Commission record:

"Mr. Graves: In connection with the question that the Court has raised, I will ask counsel if he has a copy of the transcript, the official transcript of the record before the Commission?

"Mr. Rotsch: Yes, sir, we have it.

"Mr. Graves: We would like to offer in evidence

this transcript, if the Court please.

"Judge Sibley: That is a whole lot of evidence. Is there any result coming from that? Of course, we ought to test what they did by what they ordered. (Counsel for the Commission made no comment.)

"Mr. Graves: That has been our contention, Your

Honor.

"Judge Sibley: You all don't agree about it. We are killing time. Go ahead with the evidence." (R. 131.)

At another stage of the hearing we offered in evidence, for limited purposes, the Commission record and, on objection by defendants (appellants) that it was irrelevant and immaterial, it was excluded. (R. 354.)

We submit that when the Court called upon the Commission at the trial to ascertain whether it meant business as to the 17 lines then involved, the Commission was not entitled to answer by viewing the order in an objective sense. The Commission and the Attorney General were defendants in the action and, as such, their response was evasive. Moreover, the complaint (par. 34, R. 27) charged, and the answer (R. 72) admitted, that in the absence of an injunction defendants would endeavor to subject the plaintiffs to heavy penalties if they should attempt to operate the Pullman cars without a Pullman conductor.

Since unjust discrimination is the sole statutory basis relied upon, and the failure to furnish the conductor on any train constitutes the offense (or else none is denounced), the Commission has no power to grant exemptions or "deviations" that would amount to suspending the law. So, if it be assumed that the Commission has the power, at its discretion, on unnamed conditions, to suspend the requirement, this implies that the statutory offense of unjust discrimination is not committed at all by the mere act of not having a Pullman conductor on the train. If, as the Commission asserts under its Point II, the failure to provide a Pullman conductor constitutes a violation of the penal statute, Art. 6474, then manifestly the Commission has no power to pardon the offender.

And when the Commission at once affirms (a) that by failing to furnish a conductor on any train

the statutory offense of unjust discrimination is committed, and (b) that the Commission has the power to immunize some of the railroads while holding others responsible to the law, the Commission creates this dilemma: either the act condemned by the Commission as an offense is not such, or the Commission's professed willingness to consider granting exemptions in individual cases is an empty gesture. And since, as already shown, the violation of the order is attended with heavy penalties, the so-called exemption provision, even though it is an exemption to be allowed at the Commission's option, renders nugatory the entire order. is no basis for sustaining the order at all unless, as a matter of law, unjust discrimination is inevitably committed whenever the conductor is left off of any train. Unless this is an offense, none has been named. But the admission by the Commission that, in undisclosed circumstances, to leave the conductor off of a given train is not an offense, denudes the defined offense of the only gravamen supplied by the definition.

If, as stated by appellants in their Point V (Brief, p. 80), "possibly some of the plaintiffs were entitled to an injunction," or that possibly some of the plaintiffs were entitled to "a modification of the order," this can only mean that it is not an offense under some circumstances to operate a Pullman car without a Pullman conductor. The order forbids the operation of a Pullman car in any circumstances without a Pullman conductor. To save the order the Court can not modify it. The order must stand or fall as written. And since the Commission has admitted, both in the order and in its brief (Point

V), that in undefined circumstances unnamed individuals or companies may be entitled to alleviation from the order, this is an effective admission that as a penal order it cannot stand. The order provides that, regardless of circumstances, a conductor shall be furnished. If, as is asserted by the Commission, there are circumstances in which it is not an offense to operate the train without a Pullman conductor, let the circumstances be revealed. Otherwise, we have regulation by caprice and not by law.

We are not dealing with a regulation applying to subject-matter the very nature of which requires exceptions in order that the regulation may be reasonable in its application, or where exceptions are needed in order to carry out fully the purpose of the regulation. Compare Gorieb v. Fox, 274 U. S. 603, 607. According to the express findings of the Commission, the evils at which the regulation is directed exist in the case of each and all of the 17 lines. The purported evils inhere, not in individual instances, but in the class. Hence, it is plain that any exceptions that might be granted under this "deviation" clause, in favor of members of the class, would be in the nature of mere personal and therefore unsupportable exemptions.

V.

Answer to errors specified "to be urged" but not otherwise urged.

1. Error No. 1(a), (Appellants' Brief, p. 17): In so far as this point has been argued, it has been answered by our Point I B (ante, p. 51). In addi-

tion, it is devoid of merit since (a) there was no "plea to the jurisdiction of the court"; (b) there was no motion to dismiss on the ground stated; (c) there was no motion challenging jurisdiction in equity on the ground that the contracts as pleaded were illegal and void because they represented an attempt on the part of the railroads to delegate a part of their charter powers to a foreign corporation; (d) indeed, there was no motion or pleading of any kind presenting the defense stated in Error 1(a).

- 2. Error No. 1(b), (Appellants' Brief, p. 17): This error was not presented by any motion or pleading. The complaint was in no manner challenged on the grounds stated. Even if the point had been raised, it would have presented nothing more than a basis for requiring a more particular statement in the complaint; and no motion for greater particularity in that respect was made.
- 3. Errors Nos. 2 and 3 (Appellants' Brief, p. 18) have been answered under our Point IA (ante, p. 47).
- 4. Error No. 4 (Appellants' Brief, p. 19) has been answered under our Point II (ante, p. 66).
- 5. Error No. 5 (Appellants' Brief, p. 19) has been answered by our Point III (ante, p. 76).
- 6. Error No. 6 (Appellants' Brief, p. 19) complaining of the district court's ruling that the rate features of the order are invalid because of want of notice—has been factually answered by the statements from the record under the head "2. Facts Touching the Rate Features of the Challenged Order" (ante, p. 10).

Apparently the point has been abandoned. No statements from the record appear in Appellants' Brief, purporting to support the point. Obviously where the Commission's jurisdiction to promulgate a rate order is conditioned upon notice, the Commission cannot conclude that question by reciting that notice was given. Where, as here, the notice as given is in the record (R. 34) and there is no dispute about it, and where it says nothing about rate matters, the Commission's recital that notice was given is not controlling. When we offered the Commission record, the last time, Judge Sibley stated: "What sort of hearing there was would be primarily fixed by the notice required. You have got the notice here." (R. 355.)

7. Error No. 7 (Appellants' Brief, p. 20); (This point has apparently been abandoned by the Commission, although it is presented by the Conductors in their Point No. 5, p. 27). The assertion that "this was an order authorized by said Code (Sanitary Code) and the statutes in regard to the enforcement thereof" has not been made in an assigned error (R. 373); and, we submit, is patently unsubstantial. The order is not, and does not purport to be, an exertion of powers so conferred, although the conductors contend that the Commission's Finding No. 13(c) is so supported. That finding concludes: "that the Pullman conductor is specifically charged with the responsibility of regulating the same (heating and air-conditioning) and that he receives special instructions in the operation of the same." (R. 44; Conductors' Brief, p. 29.) The finding, if it means that the porter-in-charge is incapable of attending to such matters, has been

overthrown by Finding No. 7 of the district court (ante, p. 13). As to air conditioning specifically, see "Porter and Air Conditioning" (ante, p. 31).

- 8. The proposition contained in Error No. 8 (Appellants' Brief, p. 21), is an abstract one, since neither The Pullman Company nor the railroad companies had notice that rates would be considered at the Commission hearing. Moreover, the Commission sought to prescribe and regulate sleeping car fares in 1907. The company litigated the question and it was settled adversely to the Commission by the United States Circuit Court of Appeals, Fifth Circuit, in 1908, and the judgment became final. No written opinion was filed and apparently the case was not reported. We have appended, infra, p. 114, a report of the litigation as contained in the records of the Attorney General's Office. Since then the Legislature has not enlarged the Commission's rate powers so as to include sleeping car fares, but the Codes of 1911 and 1925 have substantially readopted the statutes touching those matters as they existed in 1907.
- 9. Errors Nos. 9 (Appellants' Brief, p. 21) and 14 to 18, incl. (Brief, pp. 24-26), present in varying forms the contention argued by appellants under their Point II, and has been answered by us, under our Point II, (ante, p. 66.)
- 10. Errors Nos. 10 and 19 (Appellants' Brief, pp. 22 and 27) present, in effect, the contention (urged in Appellants' Brief, p. 42) that we are not entitled to test even the constitutional questions by judicial trial but that all that the Court can do is to review the Commission record and inquire whether

any substantial evidence was heard by the Commission supporting its order. This contention we have answered under our Point I (Sub. C), (ante, p. 58). Despite the concluding assertion in Error 19 (Brief, p. 27) the complaint did allege interference with interstate commerce and the taking of plaintiffs' property without due process of law. See, for example, paragraphs 36 c, d, e, h, i, and j (R. 28-30). In presenting the same contention in abstract form, the Conductors say (Brief, p. 24): "It is suggested that many of the same witnesses who appeared before the Railroad Commission likewise appeared before the Trial Court and thus substantially the same testimony was heard. Based upon such testimony the Trial Court arrived at a different conclusion to the administrative body and simply reversed the conclusions of the Railroad Commission." We do not understand the import of such statements. The record affirmatively shows that none of the 10 Pullman porters who testified at the trial testified at the Railroad Commission hearing. In fact, the record shows that they had no notice of the hearing and were not (R. 353.) It was affirmatively shown that some of the witnesses at the trial did testify at the Commission hearing. In the absence of the Commission record, we are not at liberty to say more. And, as elsewhere shown, we are not responsible for the fact that the Commission record is not here.

11. Error No. 11 (Appellants' Brief, p. 22) complains, ineffectively, of the District Court's Finding No. 7. The point has been briefed by appellants, in so far as briefed at all, under their Point III (Ap-

pellants' Brief, p. 70). As elsewhere shown herein, District Court Finding No. 7 has been insufficiently challenged since (a) it has not been charged in any assignment, and the evidence has not been pointed out showing, that the finding is clearly erroneous. See discussion, ante, pp. 14-15; (b) we have shown (ante, p. 41) that the finding not only is abundantly supported by the record, but that no other finding was permissible under the facts. It is apparent that appellants have staked their case upon the proposition that the trial in the district court, even where constitutional questions are drawn in issue, is confined to the single inquiry, whether substantial evidence was heard by the Commission in support of its order. This proposition being groundless, the appellants simply have no assignment of error effectively challenging the findings of the district court on the controlling fact questions in the case.

12. Error No. 12 (Appellants' Brief, p. 23), asserting that the plaintiffs' case is grounded in monopolistic contracts and that therefore plaintiffs have no standing in a court of equity, is an after-thought. (a) It was not assigned as error in the assignments of error (R. 373). Indeed, apparently the point has been abandoned and will not be pressed. (b) No motion to dismiss the complaint was made on the ground asserted in Error No. 12. (c) It will be observed that the ground asserted is that the motions to dismiss should have been granted. It is not shown and cannot be shown that it appears from the complaint that the contracts between the railroads and The Pullman Company are void and illegal. (d) The question of the validity of

the contracts was not drawn in issue at the trial in any way. The case was tried on the opposite assumption. (e) The plaintiffs' cause of action is not predicated on the contracts in the sense that the action is a suit to enforce the contracts. The contracts were brought into the case by the plaintiffs for the purpose of showing that The Pullman Company and not merely the railroad companies are directly affected by the challenged order. Wherefore, it was proper to join all of the plaintiffs in a single action. This will be further noticed in reply to Appellants' Error 13, next below.

13. Error No. 13 (Appellants' Brief, p. 23): Appellants assert that the court erred in holding that the railroads are necessary and proper parties to the action "because such a conclusion is contrary to the evidence and testimony in this case and contrary to law." The point has not been briefed and we assume that it has been abandoned. In any case, it is without merit. The relation between The Pullman Company and the railroads was established without dispute. The order is directed against the railroads but it compels the railroads to require a Pullman conductor on every train carrying a sleeping car. Appellants' point is effectively answered by the District Court's second conclusion of law and the authorities supporting it as follows:

"Since the order is directed in terms against the railroads and not against The Pullman Company, the only way in which The Pullman Company can obtain effective relief is by means of an injunction prohibiting enforcement of the challenged orders against the railroads. For this reason and for the further reason that the order undertakes to deter-

mine, and interferes with, the rights of The Pullman Company in its contracts with the railroads, the railroads are necessary and proper parties to this action. Rule 19, Federal Rules of Civil Procedure; Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77, 81-82; see also Troy v. Whitehead, 222 U. S. 39, 41; Ducker v. Butler, 104 Fed. (2d) 236, 238 (App. D. C. 1939)." (R. 368.)

14. We assume that Errors Nos. 20 and 21 challenging the jurisdiction of the district court to decide the State question where, as here, jurisdiction rests, not upon diversity, but upon Federal questions, has been abandoned. It has not been briefed and is totally devoid of merit. Jurisdiction having attached on substantial constitutional grounds, the United States Courts have jurisdiction to decide every question, local and federal, properly arising in the case. Siler v. L. & N. R. R. Co., 213 U. S. 175, 190, 191; L. & N. v. Garrett, 231 U. S. 298, 303; Waggoner Estate v. Wichita County, 273 U. S. 113, 116 (1926). We deem it unnecessary to accumulate the cases so holding.

### VI.

# Additional reply to points in Conductors' Brief.

(a) The Conductors' Point 1 (their Brief, p. 2) stating that "the only damage alleged or proved" was that the plaintiffs "would be prevented from collecting illegal, unauthorized and extortionate tolls and fares," is based upon a misapprehension of the record. Factually it is completely answered by the District Court's Findings of Fact Nos. 2 and 3.

(R. 366; stated in full, ante, p. 2.) Both of the findings are unchallenged by any assignment of error or any specification of error.

The argument presented by the Conductors under their Point 1 is wholly unrelated to the point, except a portion on pages 8 to 10, already answered in our reply to Appellants' Point I(a), ante, p. 47.

(b) The Conductors' Point 2 (their Brief, p. 11) is not within the scope of any asignment of error or specification of error. Nevertheless it has been answered at ante, pp. 10-13.

We do not question the power of the Railroad Commission to prescribe, within statutory limits, railroad rates. But when we appeared in response to the notice issued by the Commission we did not appear under a notice indicating that rates would be considered; and there is nothing in the record to show that any of the plaintiffs waived their right to the statutory ten days' notice (Article 6449) that conditions the Commission's rate making powers.

- (c) From the abstract proposition of law stated in the Conductors' Point 3 (their Brief, p. 21), we have no occasion to dissent. In so far as there is substance in the argument presented under the point, we have answered it in reply to the Appellants' Point I(b) ante, p. 51.
- (d) We find it unnecessary to combat the abstract statement made in Conductors' Point 4 (their Brief, p. 24), but the point is inapplicable. In so far as the argument presented under it seeks to apply the proposition to this case, we have answered it in reply to Appellants' Point I(c), beginning

ante, p. 58. The Conductors' last paragraph of the argument under that point (p. 26), wholly unrelated to the point, has been answered in our reply to Appellants' Point V, beginning ante, p. 87.

(e) The Conductors' Point 5, in so far as it invokes the Public Health Sanitary Code, has been answered by us (ante, p. 97) in reply to appellants' unargued specification of error No. 7.

We have no occasion to dissent from the Conductors' diagnosis of the challenged order as being an attempted "exercise of the police power of the State." To that extent the Conductors are aligned with us and against the Commission. The Commission seeks to uphold the order by ascribing it to the Commission's authority to prevent "unjust discrimination," as defined by Article 6474. The order, its findings included, bears irrefutable internal evidences of the Commission's design to enact a police regulation-in the interest of what the Commission has repeatedly in its findings referred to as the safety and convenience of the passengers. The Attorney General, properly recognizing that the Commission has no such power, has presented no such point.

The contention thus advanced by the Conductors bespeaks a want of confidence in the stand taken by the Commission in defending its order. Such contention is answered by the court's Finding No. 7, as to which there is no effective assignment of error and no effective point of argument in the brief of either the Commission or the Conductors.

(f) The Conductors' Point 6 is not within the scope of any assignment of error, and the argument

under it touches none of the issues in the case. The constitutional attack upon the order is not conditioned upon the unreasonableness of the cost of complying with it. The district court's findings, however, that to comply with the order will cost The Pullman Company \$25,000.00 per annum after allowing all offsets; and that it will cost each of the porters-in-charge \$13.50 per month during their active service, and a related amount during their retirement (Findings 2 and 3, R. 366), have not been challenged.

## Conclusion

The order is not within the scope of powers delegated to the Railroad Commission; and consequently is violative of State law. It is without rational basis, and contravenes the 14th Amendment to the National Constitution. We therefore respectfully submit that the judgment of the district court appealed from should be affirmed.

Respectfully submitted,

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January 14, 1941.

#### APPENDIX

## Art. 6380-Full Crew.

No railroad company or receiver of any railroad company doing business in this State shall run over its road, or part of its road, outside of the yard limits:

1. Any passenger train with less than a full passenger crew consisting of four persons: one engineer, one fireman, one conductor and one brakeman.

2. Any freight train, gravel train or construction train with less than a full crew consisting of five persons: one engineer, one fireman, one conductor and two brakemen.

3. Any light engine without a full train crew consisting of three persons: one engineer, one fire-

man and one conductor.

4. The provisions of this article shall not apply to nor include any railroad company or receiver thereof, of any line of railroad in this State, less than twenty miles in length; and nothing in subdivisions one and two hereof shall apply in case of disability of one or more of any train crew while out on the road between division terminals, or to switching crews in charge of yard engines, or which may be required to push trains out of the yard limits.

Any such company or receiver which shall violate any provision of this article shall be liable to this State for a penalty of not less than one hundred nor more than one thousand dollars for each offense. Suit for such penalty shall be brought in Travis County or in any county in or through which such line of railroad may run, by the Attorney General, or under his direction, or by the county or district attorney in any county in or through which such railroad may be operated. Such suits shall be sub-

ject to the provisions of Article 6477.

Art. 6453—Judicial Review. (See Appellants' Brief, pp. 94-95).

### Art. 6454—Burden of Proof.

The burden of proof shall rest upon the plaintiff to show the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them.

# Art. 6474—Unjust Discrimination.

Unjust discrimination is hereby prohibited and the following acts or either of them shall constitute unjust discrimination.

- 1. If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or shall give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.
- 2. If any railroad company shall fail or refuse, under regulations prescribed by the Commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as the Commission may prescribe, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connect-

ing line of railroad; provided perishable freights of all kinds and live stock shall have precedence of shipment.

- If any railroad company shall charge or re-3. ceive any greater compensation in the aggregate for the transportation of like kind of property or passengers for the shorter line than for a longer distance over the same line; provided, that upon application to the Commission any railroad may in special. cases, to prevent manifest injury, be authorized by the Commission to charge less for longer than for shorter distances for transporting persons and property, and the Commission shall, from time to time, prescribe the extent to which such designated railroad may be relieved from the operation of this provision. No injustice shall be imposed upor any citi-· zen at intermediate points. Nothing here a shall be so construed as to prevent the Commission from making what are known as "group rates" on any line or lines of railroad in this State.
  - 4. Penalty.—Any railroad company guilty of unjust discrimination as hereinbefore defined shall for each offense pay to the State of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars.
  - 5. Exceptions.—Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates, or to prevent railroads from giving free transportation or reduced transportation under such circumstances and to such persons as the law of this State may permit or allow.

This is a reenactment without substantial change of Sec. 15 of the original Railroad Commission Act (Acts of 22nd Leg., 1891, pp. 55, 62; 10 Gammel's Laws, pp. 57, 64). It was first reenacted as Art. 4574, R. C. S. of 1895, then as Art. 6670, R. C. S. 1911.

### Art. 6476-Penalty Not Otherwise Provided.

If any railway company doing business in this State shall violate any provision of this title, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided by law or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the Commission, for every such act of violation it shall pay to the State of Texas a penalty of not more than five thousand dollors.

### Art. 6477-Suits for Penalty.

All of the penalties herein provided, except as provided in Article 6475, recoverable by the State shall be recovered and suits thereon shall be brought by the Attorney General or under his direction in the name of the State of Texas, in Travis county, or in any county into or through which such railroad may run; and the attorney bringing such suit shall receive a fee to be paid by the State of fifty dollars for each penalty recovered and collected by him, and ten per cent of the amount collected. In all suits arising under this chapter, the rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State under this chapter shall be paid into the State Treasury; provided suits brought under Title 66 for recovery of penalties, may be brought in any county:

1. Where an act violative of any provision thereof is committed.

2. Where such company or receiver has an agent

or representative.

3. Where the principal office of such company is situated, or such receiver or receivers, or either, reside. One-half of all moneys collected under the

provisions of said title, less the commission and expenses allowed by law, shall be paid into the State Treasury; the remainder thereof shall be paid into the treasury of the county where such suit or suits may be maintained and constitute a part of the jury fund of such county.

### Art. 7063—Sleeping, Palace or Dining Car Companies.

Every sleeping car company, palace car company, or dining car company doing business in this State, and each individual, company, corporation or association leasing or renting, owning, controlling or managing any palace cars, dining cars, or sleeping cars within this State for the use of the public, for which any fare is charged, shall, on the first days of January, April, July and October of each year, report to the Comptroller, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts earned from any and all sources whatever within this State, except from receipts derived from buffet service, during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to five per cent of said gross receipts as shown by said report. The tax herein provided for shall be in lieu of all other taxes now levied upon sleeping car, palace car or dining car companies, except the tax of twenty-five cents on the one hundred dollars of capital stock of such car companies as provided by law. Id.

#### Art. 7098-State Tax Board.

The State Tax Board shall be composed of the Comptroller, the Secretary of State and of the Attor-

ney General. A record of the proceedings of said board shall be kept at the State Capitol, and shall be open to the inspection of the public. Acts 1905, p. 35; Acts 1907, 1st C. S., p. 469; Acts 1939, 46th Leg., S. B. No. 119, Sec. 1.

### Art. 7105—Tax on Intangible Assets.

. Each incorporated railroad company, ferry company, bridge company, turnpike or toll company, oil pipe line company, and all common carrier pipe line companies of every character whatsoever, engaged in the transportation of oil, doing business wholly or in part within this State, whether incorporated under the laws of this State, or of any other State, territory, or foreign country, and every other individual, company, corporation or association doing business of the same character in this State, in addition to the ad valorem taxes on tangible properties which are or may be imposed upon them respectively, by law, shall pay an annual tax to the State, beginning with the first day of January of each year, on their intangible assets and property, and local taxes thereon to the counties in which its business is carried on; which additional tax shall be assessed and levied upon such intangible assets and property. in the manner provided in this chapter. The county or counties in which such taxes are to be paid, and the manner of apportionment of the same, shall be determined in accordance with the provisions of this chapter. Acts 1905, p. 35; Acts 1907, 1st C. S., p. 469; Acts 1933, 43rd Leg., p. 409, ch. 162, Sec. 12.

#### Other Railroad Statutes.

Other railroad statutes, with condensed statement of their subjects, are listed below. They are referred to, not as having any bearing on this case, but as illustrating the policy of the State in regulating the railroads in a detailed way through acts of the Legislature.

Article 6458—Emergency freight rates.

Article 6459—Temporary tarins—"whenever an emergency arises."

Article 6466—Commission shall ascertain cost of railway, etc.

Article 6470—Commission shall investigate all through freight rates, etc.

Article 6473—Provides a penalty of not less than \$100 nor more than \$5000 per day if any railroad company subject to the provisions of this title shall be guilty of extortion as defined in the statute.

Article 6479—Conferring certain powers upon the Commission to relax requirements as to number of passenger trains, providing for hearings; stopping at county seats.

Articel 6479a—(Acts 1933, 43rd Leg., p. 280, Ch. 110) Requiring adequate and frequent freight rates and conferring certain powers upon the Commission in that respect after hearing.

Article 6481—Requiring railroad company to furnish freight cars to shippers.

Article 6482-Penalty.

Article 6490—Requiring every railroad company to provide sufficient tracks, switches, sidings, yards, depots, motive power, cars and all other needful facilities and appliances for receiving and delivering freight.

Article 6491—Requiring railroads to interchange cars at junction points.

Article 6492—Authorizing Commission to make rules governing the furnishing of freight cars and for exchanging and interchanging the same.

Article 6496—Defining shipper.

Article 6497—Defining "reasonable time" for furnishing cars to shipper.

Article 6498—Requiring railroad companies to provide and maintain adequate, convenient and clean depots, etc.

Article 6499—Authorizing Commission to require union passenger depots.

Article 6503—Declaring as an abuse the operation of double header trains under certain circumstances and authorizing the Commission to investigate such abuses and see that same are corrected, regulated or prohibited as hereinafter provided.

Article 6504—Same subject.

Article 6505—Penalty for same.

Article 6506—Authorizing Commission to require railroad to maintain road bed and track in proper condition.

Article 6507-Penalty.

Article 6509-Requiring sidings and spur track.

Article 6510—Authorizing Commission to require compliance with "preceding article."

- Article 6511—Requiring railroad to connect with private switch, tracks and to furnish connections therefor.
- Article 6512—Authorizing Commission to enter orders governing maintenance and operation of switch connections.
- Article 6513—Authorizing Commission to fix rates for moving freight over spur tracks to private industries.
- Article 6514—Authorizing Commission to prescribe rates for operation of side tracks, spur tracks, etc.
- Article 6515—Preventing discrimination as to spur tracks and authorizing the Commission to order railroads to furnish equal accommodations to all shippers "similarly situated on the same terms and conditions."

Article 6516—Penalty.

- Article 6517—Giving action for damages for violation of 6 preceding articles.
- Article 6518—Authorizing Commission to investigate and to require after notice and hearing rearrangement of tracks, switches and depot buildings.

Article 6519-Penalty.

#### Report of Pullman Fare Case.

No. 1791.—The Pullman Company et al. vs. Railroad Commission of Texas: Suit for injunction in the Circuit Court of the United States, Northern District of Texas, to restrain the enforcement of an order of the Railroad Commission reducing the rates to be charged for berths and seats in sleeping cars. The demurrers to plaintiff's bill were argued and overruled, and the court rendered judgment on February 4, 1908, continuing in force the temporary injunction which had theretofore been issued. The time for filing answer was enlarged to the rule day in January, 1908, and the defendants appealed from the order continuing the injunction in force, to the Circuit Court of Appeals, at New Orleans, which court affirmed the judgment of the Circuit Court at Dallas. (Reports of the Attorney General of Texas, 1906-1908, p. 36.)

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### SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1940

### No. 283

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL.,

Appellants,

vs.

THE PULLMAN COMPANY, GUY A. THOMPSON,
TRUSTEE, THE ST. LOUIS, BROWNSVILLE AND
MEXICO RAILWAY COMPANY, DEBTOR, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

### APPELLEES' MEMORANDUM FOLLOWING ORAL ARGUMENT.

In his concluding argument, counsel for the Commission said that, in response to questions from the Bench, we had made extra-record statements touching the existence of the collective bargaining agreements. In this respect counsel for The Commission unintentionally erred.

We had assumed that, considering the Commission's findings (R. 46-52), Appellees would hardly contend, as now seems to be contended (their Reply Brief 15-16), that the order can be satisfied by changing the title of the men now serving as porters in charge, to conductor.

The Pullman Company has a collective bargaining agreement with the Appellant, The Order of Sleeping Car Conductors (R. 99); and with the porters' organization (R. 88). Both agreements have been made pursuant to The Railway Labor Act (R. 99).

As is characteristic of such agreements, seniority rights are recognized. Indeed, conductors have seniority rights in their respective districts (R. 84), as do the porters (R. 88).

The Company has employed no new conductors (except possibly 2 or 3) anywhere in ten years or more (R. 116); and no new porters in Texas in 10 years or more (R. 127). The dropping of cars, with consequent decline in demand for conductors and porters, has followed decline in business. From 1929 to 1934 the Company suffered a drop of more than 50% in number of Pullman passengers hauled, and of 42 or 43% in cars operated and in conductor requirements (R. 93, 125).

Obviously, if the men now serving as porters in charge, approaching the retirement age (Appellees' Brief 15), should give up their senior ranking as porters (R. 87-88) to take places as conductors they would be on the extra list; that is, presently unemployed, with little or no prospect of employment later.

Counsel for the Commission, while complaining of the absence of the Commission record, stated that we had offered it in evidence. We offered it not merely once but twice. The second time, the trial Court called upon counsel for the Commission to say whether they wanted it in or out.

Whereupon they objected to its being received, and the Court again excluded it (R. 354-355).

Respectfully submitted,

LOWELL M. GREENLAW,
HERBERT S. ANDERSON,
CHARLES L. BLACK,
IRELAND GRAVES,
Attorneys for The Pullman Company.
CLAUDE POLLARD,
F. B. WALKER,
Attorneys for Railroad Companies,
and Trustees, Appellees.
IRELAND GRAVES,

Attorney for Intervener Appellees.

February 6, 1941.

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### SUPREME COURT OF THE UNITED STATES.

No. 283.—Остовек Текм, 1940.

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, et al., Appellants,

US.

The Pullman Company, Guy A.
Thompson, Trustee, The St. Louis,
Brownsville and Mexico Railway
Company, Debtor, et al.

Appeal from the District Court of the United States for the Western District of Texas.

[March 3, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In those sections of Texas where the local passenger traffic is slight, trains carry but one sleeping car. These trains, unlike trains having two or more sleepers, are without a Pullman conductor; the sleeper is in charge of a porter who is subject to the train conductor's control. As is well known, porters on Pullmans are colored and conductors are white. Adressing itself to this situation, the Texas Railroad Commission after due hearing ordered that "no sleeping car shall be operated on any line of railroad in the State of Texas . . . unless such cars are continuously in the charge of an employee . . . having the rank and position of Pullman conductor". Thereupon, the Pullman Company and the railroads affected brought this action in a federal district court to enjoin the Commission's order. Pullman porters were permitted to intervene as complainants, and Pullman conductors entered the litigation in support of the order. Three judges having been convened, Judicial Code, § 266, as amended, 28 U. S. C. § 380, the court enjoined enforcement of the order. From this decree, the case came here directly. Judicial Code, § 238, as amended, 28 U. S. C. § 345.

The Pullman Company and the railroads assailed the order as unauthorized by Texas law as well as violative of the Equal Protection, the Due Process and the Commerce Clauses of the Constitution. The intervening porters adopted these objections but

mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment.

The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law.

The Commission found justification for its order in a Texas statute which we quote in the margin.1 It is common ground that if the order is within the Commission's authority its subject matter must be included in the Commission's power to prevent "unjust discrimination . . . and to prevent any and all other abuses" in the conduct of railroads. Whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas concept of "discrimination" is far from clear. What practices of the railroads may be deemed to be "abuses" subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the.

<sup>1</sup> Vernon's Anno. Texas Civil Statutes, Article 6445:

<sup>&</sup>quot;Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent united discrepancy of the corporations and to correct abuses and prevent united discrepancy. just discrimination in the rates, charges and tolls of such railroads, persors, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law."

state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. Glenn v. Field Packing Co., 290 U. S. 177; Lee v. Bickell, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the "exercise of the sound discretion, which guides the determination of courts of equity". Beal v. Missouri Pacific R. R., No. 72; decided January 20, 1941. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. See, for modern instances, Beasley v. Texas & Pacific Ry., 191 U. S. 492; Harrisonville v. Dickey Clay Co., 289 U. S. 334; United States v. Dern, 289 U. S. 352. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U. S. 240; Spielman Motor Co. v. Dodge, 295 U. S. 89; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U S. 159; cf. Hawks v. Hamill, 288 U. S. 52, 61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion", restrain their authority because of "scrupulous regard for the rightful independence of the

state governments" and for the smooth working of the federal judiciary. See Cavanaugh v. Looney, 248 U. S. 453, 457; Di Giovanni v. Camden Ins. Assn., 296 U. S. 64, 73. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, § 24(1), as amended, 28 U. S. C. § 41(4); 47 Stat. 70, 29 U. S. C. §§ 101-15.

Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. Beal v. Missouri Pacific R. R., supra: Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare Thompson v. Magnolia Co., 309 U. S. 478, .

We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare Atlas Ins. Co. v. Southern, Inc., 306 U. S. 563, 573, and cases cited.

Reversed and remanded.

Mr. Justice Roberts took no part in the consideration or decision of this case.

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Test: